Supreme Court, U.S.
F I L E D

94 449 SEP - 8 1994

No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

SANTA FE PACIFIC CORPORATION, PETITIONER,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

DAVID C. GUSTMAN
HARRY L. DELUNG, JR.
WESTON W. MARSH
Freeborn & Peters
311 South Wacker Drive
Chicago, Illinois 60606
(312) 360-6000

JAMES D. HOLZHAUER
Counsel of Record
STEPHEN M. SHAPIRO
KENNETH S. GELLER
ANGELA K. DORN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

QUESTION PRESENTED

This case arises under the Employee Retirement Income Security Act ("ERISA"). Petitioner Santa Fe Pacific Corporation ("Santa Fe") sold the stock of a subsidiary, Santa Fe Trails Transportation Company ("SFTT"), in 1984. SFTT was a contributing employer to respondent, Central States, Southeast and Southwest Areas Pension Fund ("Central States"), a multiemployer pension plan. In 1987, after SFTT under its new ownership stopped making pension contributions, Central States assessed withdrawal liability of $7.6 million against Santa Fe, claiming that "a principal purpose" of the sale of SFTT was to evade or avoid withdrawal liability and that the sale transaction could therefore be disregarded under 29 U.S.C. § 1392(c).

The question presented is whether the Seventh Circuit correctly held, in conflict with the rulings of the Pension Benefit Guaranty Corporation and several other circuits, that a company may be held liable for withdrawal liability under ERISA because it intentionally structured the sale of a subsidiary to take advantage of a statutory safe harbor designed to *prevent* the imposition of withdrawal liability.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

All of the parties to the proceedings below are named in the caption.

Petitioner's subsidiaries (other than its wholly-owned subsidiaries) are as follows:

Alameda Belt Line
The Belt Railway Company of Chicago
Central California Traction Company
Fibertrack Limited Partnership
Houston Belt & Terminal Railway Company
Kansas City Terminal Railway Company
LCRS, Limited Partnership
The Oakland Terminal Railway
Rail Cycle Limited Partnership
SFPP, Limited Partnership
SLR, Limited Partnership
St. Joseph Terminal Railroad Company
Santa Fe Pacific Pipelines Partnership, L.P.
Sunset Railway Company
Texas City Terminal Railway Company
TTX Company
The Witchita Union Terminal Railway Company

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 8

I. SECTION 1392(c) DOES NOT APPLY WHEN AN EMPLOYER STRUCTURES A TRANSACTION IN COMPLIANCE WITH § 1398 IN ORDER TO PREVENT THE ASSESSMENT OF WITHDRAWAL LIABILITY 9

II. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE INTERPRETATION OF THE PBGC 14

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THE THIRD, SIXTH AND NINTH CIRCUITS 16

TABLE OF CONTENTS—Continued

Page

IV. THE COURT OF APPEALS' DECISION DISRUPTS THE SETTLED UNDERSTANDING OF THE OPERATION OF MPPAA IN SALE-OF-BUSINESS TRANSACTIONS 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases: Page

Berkshire Hathaway, Inc. v. *Textile Workers Pension Fund*, 874 F.2d 53 (1st Cir. 1989) 16

Building Services Employees Pension Trust v. *Ogden Allied Services Corp.*, 10 Emp. Ben. Cases 1401 (Arb. 1988) 20

Central States, S.E. & S.W. Areas Health & Welfare Fund v. *Cullum Cos.*, 973 F.2d 1333 (7th Cir. 1992) 20

Central States, S.E. & S.W. Areas Pension Fund v. *Lady Baltimore Foods, Inc.*, 960 F.2d 1339 (7th Cir.), cert. denied, 113 S. Ct. 179 (1992) 12

Connolly v. *PBGC*, 475 U.S. 211 (1986) 11

Cuyamaca Meats, Inc. v. *Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987), cert. denied, 485 U.S. 1008 (1988) 18-19

Dorn's Transp., Inc. v. *Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986) 11, 17

Flying Tiger Line v. *Teamsters Pension Trust Fund*, 830 F.2d 1241 (3d Cir. 1987) 17

TABLE OF AUTHORITIES—Continued

Page

Korman Corp. v. *Teamsters Pension Trust Fund*, 10 Emp. Ben. Cases 1608 (Arb. 1988) 20

Mastro Plastics Corp. v. *Labor Board*, 350 U.S. 270 (1956) 14

Mead Corp. v. *Tilley*, 490 U.S. 714 (1989) 16

PBGC v. *LTV Corp.*, 496 U.S. 633 (1990) 16

PBGC v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 9, 10

Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) 14

Rake v. *Wade*, 113 S. Ct. 2187 (1993) 14

Richards v. *United States*, 369 U.S. 1 (1962) 14

Teamsters Pension Trust Fund v. *Central Mich. Trucking, Inc.*, 698 F. Supp. 698 (W.D. Mich. 1987), aff'd, 857 F.2d 1107 (6th Cir. 1988) 11, 17-18

Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 14

TABLE OF AUTHORITIES—Continued

Page

Statutes and Administrative Rulings:

26 U.S.C. § 9722 13

29 U.S.C. § 1002(37)(A) 20

29 U.S.C. § 1362(d) 10

29 U.S.C. § 1381 . . . . . 2, 10

29 U.S.C. § 1384 . . . . . *passim*

29 U.S.C. § 1385 7

29 U.S.C. § 1392(c) . . . . . *passim*

29 U.S.C. § 1398 . . . . . *passim*

29 U.S.C. § 1399(b) 20

29 U.S.C. § 1401(a) 5

PBGC Opn. Ltr. 82-4 (Feb. 10, 1982) 11, 15

PBGC Opn. Ltr. 85-15 (May 31, 1985) 15-16

PBGC Opn. Ltr. 92-1 (Mar. 30, 1992) 11

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous:

ABA, EMPLOYEE BENEFITS LAW (1991) 23

126 Cong. Rec. 23038 (1980) 13

Cummings, "Employee Benefit Liabilities Upon Transfer of Ownership," BNA PENSION RPTR. 876 (June 24, 1985) 23

Cummings, "Labor Relations and ERISA: Considerations In Corporate Change (Mergers, Acquisitions, Bankruptcy)," in ALI-ABA, LABOR AND EMPLOYMENT LAW 1787 (6th ed. 1992) 23

FEDERAL DOCUMENT CLEARING HOUSE CONG. TESTIMONY, June 15, 1994 21

Griffey, Gorman & Curtis, "Employee Benefit Plans In Corporate Acquisitions, Dispositions and Mergers," in H. Shecter (ed.), ACQUIRING OR SELLING THE PRIVATELY HELD COMPANY 273 (Practising Law Institute 1993) 23

H.R. Rep. No. 869, Pt. II, 96th Cong., 2d Sess. (1980) 11

TABLE OF AUTHORITIES—Continued

Page

Kershaw, "Multiemployer Plans -- Special Rules," 359-3d TAX MANAGEMENT PORTFOLIO (1993) 23

Kladder, "Asset Sales After MPPAA -- An Analysis of ERISA Section 4204," 39 BUS. LAW. 101 (1983) 22

PBGC, 1993 ANNUAL REPORT 20

"PBGC Involvement in Bankruptcy Discussed at Bar Association Conference," BNA PENSION RPTR. 540 (Mar. 20, 1989) 23

Perry, "Mergers and Acquisitions: Buyers Beware," 36 RISK MANAGEMENT 66 (Nov. 1989) 23

Shecter, "Acquiring Corporate Assets Without Successor Liability: Is It A Myth?," 1986 COLUM. BUS. L. REV. 137 21

"Teamsters Central States Fund Trustees Select Morgan Stanley As Assets Manager," 10 BNA PENSION RPTR. 1784 (Nov. 28, 1983) 20

In the Supreme Court of the United States

OCTOBER TERM, 1994

SANTA FE PACIFIC CORPORATION, PETITIONER,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Santa Fe Pacific Corporation ("Santa Fe") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 22 F.3d 725. The four opinions of the district court (App., *infra*, 10a-14a, 25a-32a, 45a-56a, & 57a-67a) are unreported. The three opinions of the arbitrator (App., *infra*, 15a-24a, 33a-44a, & 68a-132a) are also unreported.

JURISDICTION

The court of appeals entered its judgment on April 22, 1994 (App., *infra*, 1a), and denied Santa Fe's petition for rehearing on June 10, 1994 (*Id.* at 9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves two sections of the Employee Retirement Income Security Act ("ERISA"): 29 U.S.C. § 1392(c) and 29 U.S.C. § 1398. The relevant portion of § 1398 provides:

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because --
>
> (1) an employer ceases to exist by reason of --
>
> (A) a change in corporate structure described in section 1362(d) of this title
>
> * * *
>
> if the change causes no interruption in employer contributions or obligations to contribute under the plan.

Section 1392(c) provides:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

STATEMENT

In 1984, Santa Fe sold one of its subsidiaries, the Santa Fe Trails Transportation Company ("SFTT"). At the time of the sale, SFTT was obligated to contribute to the Central States, Southeast and Southwest Areas Pension Fund (the respondent, "Central States") on behalf of its Teamsters Union employees. Central States is an underfunded multiemployer pension plan; under the provisions of the 1980 amendments to ERISA (the Multiemployer Pension Plan Amendments Act, or "MPPAA"), employers that withdraw from underfunded multiemployer plans may be required to pay sizable amounts of money as "withdrawal liability." 29

U.S.C. § 1381. Ordinarily, when a parent sells the stock of a subsidiary that is a member of a multiemployer plan, that sale does not constitute a withdrawal from the plan and does not trigger withdrawal liability. 29 U.S.C. § 1398. Similarly, there is no withdrawal if the parent sells the assets of a subsidiary and structures the sale to conform to another MPPAA provision, 29 U.S.C. § 1384. But "[i]f a principal purpose of any transaction is to evade or avoid [withdrawal] liability," liability is assessed "without regard to such transaction." 29 U.S.C. § 1392(c).

In this case, the court of appeals held that Santa Fe wanted to divest itself of SFTT "for reasons unrelated to withdrawal liability." App., *infra*, 4a. But Santa Fe's decision to make that divestiture in the *form* of a sale of stock, rather than a sale of assets, was (in the court's view) based in significant part on the company's desire to prevent the assessment of withdrawal liability. *Ibid.* See also *id.* at 7a.

The issue in this case is whether a company that decides to sell a subsidiary for reasons unrelated to withdrawal liability, but then intentionally structures the transaction to come within one of MPPAA's "safe harbors" (§ 1398 or § 1384) in order to prevent the imposition of withdrawal liability, runs afoul of § 1392(c) and is thus subject to withdrawal liability. The court of appeals, rejecting the decisions of the district court and the arbitrator selected by the parties and departing from the opinions of other courts of appeals and the Pension Benefit Guaranty Corporation (the "PBGC"), held that Santa Fe was subject to withdrawal liability.

1. Santa Fe was a holding company; its largest subsidiary was The Atchison, Topeka and Santa Fe Railway Company (the "Railroad"). C.A. App. 274-277. Prior to the deregulation of the trucking industry, the Railroad and SFTT worked together to provide "piggyback" transportation services. SFTT trucks would haul loaded trailers to the

Railroad's yards, where they would be placed on flatbed railcars for shipment to their ultimate destination. C.A. App. 395. Deregulation opened up the market served by SFTT to other carriers, and led Santa Fe to re-evaluate whether it should continue in SFTT's business. C.A. App. 155, 308, 434-446.

In 1981, Santa Fe asked a consultant to study SFTT and to make recommendations on whether Santa Fe should retain the subsidiary and remain in the trucking end of the piggyback transportation business. C.A. App. 414-415, 444-446. It is undisputed that when Santa Fe commissioned this study, it was unaware of the prospect of withdrawal liability. C.A. App. 397; App., *infra*, 5a. Santa Fe ultimately decided in early 1983 to divest itself of the subsidiary. C.A. App. 155.

Once it decided to divest itself of SFTT, Santa Fe was faced with a choice between selling the subsidiary's stock or selling its assets, "either piecemeal or in a lump." App., *infra*, 4a. Two serious bidders came forward with offers to buy SFTT: a group of SFTT management employees, led by chief financial officer Larry McKee, and a rail consolidator, Rail Services, Inc. ("RSI"). *Id.* at 37a, 123a. The bidders proposed to purchase SFTT's stock in leveraged buyouts. Santa Fe accepted the RSI bid, and the sale closed on July 6, 1984. C.A. App. 638. As part of the transaction, RSI agreed to continue contributing to Central States. C.A. App. 629-630.

Events after the closing brought about SFTT's demise. Two months after the SFTT purchase, RSI (the new owner) bought three trucking subsidiaries of the Burlington Northern Railroad. The arbitrator found that purchase to be "a serious blunder from a financial and operational point of view." App., *infra*, 22a. Then, in December 1984, the Teamsters Union began a crippling strike against SFTT and SFTT

suspended pension fund payments to Central States. *Ibid.*[1/] The company was forced into bankruptcy and permanently stopped contributing to Central States in July 1985. C.A. App. 675.

In December 1987, having failed in its effort to collect withdrawal liability from RSI and SFTT, Central States served a notice of withdrawal liability on Santa Fe in the amount of $7.6 million. App., *infra*, 2a; C.A. App. 271. Asserting that it was not responsible for the liabilities of its former subsidiary, Santa Fe challenged the assessment and the matter was submitted to arbitration as required by the statute. 29 U.S.C. § 1401(a).

2. After fifteen days of hearings, the arbitrator selected by the parties from the American Arbitration Association's panel of withdrawal liability specialists issued three decisions in this case, each time ruling in favor of Santa Fe. App., *infra*, 15a-24a, 33a-44a & 68a-132a. Although the arbitrator's first opinion included lengthy excerpts from the briefs and other documents filed by the parties, the arbitrator's own analysis (*id.* at 118a-129a) concluded that Santa Fe's decision to sell SFTT was not based on a desire to avoid withdrawal liability:

> It is the Arbitrator's finding that Santa Fe made its decision to sell SFTT for legitimate reasons and not to evade or avoid withdrawal liability. A careful study of the transcripts of this case, along with all of the written evidence, indicates that the concept of synergy was an important factor in the original decision to sell SFTT. Of course, there were other reasons. But the nature of SFTT's business was at cross-purposes with the goals of Santa Fe. In evalu-

---

[1/] Section 1398(2) of ERISA provides that suspension of contributions to a multiemployer plan during a labor dispute does not constitute a withdrawal.

> ating SFTT's "strategic fit" within Santa Fe, the conclusion was reached that for reasons concerning maximizing the return on their investment, as well as the various reasons related to synergy, that SFTT did not meet Santa Fe's goals or expectations.

App., *infra*, 119a-120a.

After the arbitrator issued his initial decision, Santa Fe brought an action in district court to confirm the award, Central States filed a counterclaim to vacate the award, and both parties moved for summary judgment. The district court held that Santa Fe and Central States had both urged the arbitrator to apply incorrect interpretations of the "evade or avoid" rule of § 1392(c). According to the court, Santa Fe argued that "in order for its sale to violate § 1392(c), the arbitrator would have to find that the transaction was a sham or fraud, or that it had as *the* principal purpose the evasion or avoidance of [withdrawal] liability." App., *infra*, 59a. Central States, on the other hand, argued that it "proved that Santa Fe violated § 1392(c) by showing that the company considered withdrawal liability as one of many factors in deciding to sell SFTT." *Id.* at 59a-60a.

The district court rejected both of these interpretations, holding that "[t]he plain language of § 1392(c) requires that evasion or avoidance must be one of the significant or central factors." App., *infra*, 60a. "[M]ere consideration of the impact of the MPPAA" does not violate § 1392(c), but the section is not limited to sham or fraudulent transactions or transactions that have as their only principal purpose the evasion or avoidance of withdrawal liability. *Id.* at 59a-60a. Because both parties in the court's view had urged incorrect interpretations of § 1392(c), and the arbitrator had not made a clear choice between them, the court was "not certain the arbitrator applied the correct standard." *Id.* at 57a. The court remanded the case for a determination of whether "*a*

principal purpose" of the transaction was to evade or avoid withdrawal liability. *Id.* at 60a.[2/]

On remand, the arbitrator again ruled for Santa Fe, holding that "the sale of SFTT did not have as a principal purpose the evasion or avoidance of withdrawal liability." App., *infra*, 38a. The arbitrator specifically rejected Central States' argument that "Santa Fe chose the LBO/stock sale as the transaction to dispose of SFTT precisely because that transaction could be entered without triggering withdrawal liability." *Id.* at 39a. Although the arbitrator did apply the district court's standard, the court once again declined to affirm the award, holding that "[w]hile Arbitrator Mitrani has made the results of his deliberations clear enough, he has given us no indication of the process he employed to arrive there." *Id.* at 29a-30a. The court "reluctantly" returned the case to the arbitrator to specify the evidence he relied upon in reaching his decision. *Id.* at 31a.

The arbitrator's third opinion, again in favor of Santa Fe, specified the evidence in the record supporting the conclusion that evasion or avoidance of withdrawal liability was not a principal purpose of the transaction and addressed much of the contrary evidence offered by Central States. App., *infra*, 16a-24a. This time the district court affirmed the award, holding that the arbitrator's decision was supported by the evidence and not clearly erroneous. *Id.* at 10a-14a.

[2/] In a motion for reconsideration filed after the district court issued its initial decision, and again in its Seventh Circuit briefs, Central States argued that there was an additional basis for its assessment of withdrawal liability against Santa Fe: a 70% decline in contribution levels by Santa Fe from 1983 to 1985. See 29 U.S.C. § 1385. The district court denied the reconsideration motion, holding that Central States had waived that argument by not properly presenting it earlier. App., *infra*, 47a-48a. Accordingly, the court of appeals did not discuss or decide that issue.

3. The court of appeals reversed. The issue, according to the appellate court, was whether avoidance of withdrawal liability was a principal purpose of Santa Fe's decision to *structure* the transaction as a sale of stock rather than a sale of assets, not whether it was a principal purpose of Santa Fe's decision to divest itself of SFTT. As the court put it, "[t]here is no doubt that for reasons unrelated to withdrawal liability Santa Fe wanted to get rid of the subsidiary." App., *infra*, 4a. But that was not the issue:

> The issue is not whether Santa Fe had compelling reasons independent of withdrawal liability to divest itself of SFTT; that is a given. The issue is the *form* the divestiture took -- a sale of stock rather than of assets.

Id. at 7a.

The court of appeals held that the entire transaction could be disregarded under § 1392(c) if "*a* principal purpose" of the decision to structure the transaction as a stock sale was to escape withdrawal liability. App., *infra*, 3a. "It needn't be the only purpose; it need only have been one of the factors that weighed heavily in the seller's thinking." *Ibid.* The court did not explain how its interpretation of § 1392(c) could be reconciled with § 1384 and § 1398, the statutory safe harbors that expressly permit sellers of businesses to structure their transactions to prevent withdrawal liability.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision fundamentally misconstrues several important provisions of federal pension law. Congress *expressly provided* that parties could lawfully avoid triggering withdrawal liability by structuring sale-of-business transactions in accordance with § 1398 or § 1384. The notion that a company violates § 1392(c) by structuring a transaction in compliance with the requirements of these statutory safe harbors is simply untenable and contrary to the architecture of

the law. The court of appeals' construction of the statute means that only companies that are ignorant of the safe harbors are entitled to their benefit. It is not at all surprising that the Pension Benefit Guaranty Corporation, as well as the Third Circuit, the Sixth Circuit, and the Ninth Circuit, have all interpreted § 1392(c) in a manner that conflicts with the Seventh Circuit's ruling.

The court of appeals' decision calls into question an assumption that has been critical to numerous sale-of-business transactions since the enactment of MPPAA. Practitioners' guides routinely advise that the proper way to prevent any assessment of withdrawal liability upon the sale of a business is to structure the transaction as a stock sale. Unless the Court resolves the conflict among the circuits -- and the disagreement between the Seventh Circuit and the PBGC -- parties to sale-of-business transactions will not be able to make reasonably accurate predictions regarding liabilities that can amount to millions of dollars. The uncertainty the decision creates for a large number of legitimate business transactions and the damage it does to the carefully-balanced structure of MPPAA warrant review by this Court.

I. SECTION 1392(c) DOES NOT APPLY WHEN AN EMPLOYER STRUCTURES A TRANSACTION IN COMPLIANCE WITH § 1398 IN ORDER TO PREVENT THE ASSESSMENT OF WITHDRAWAL LIABILITY

Congress enacted MPPAA to address the problems of underfunded multiemployer pension plans (and the anticipated problems of the PBGC, the government agency that would be called upon to "bail out" failed multiemployer plans). *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 720-723 & n.2 (1984). As the Executive Director of the PBGC explained to Congress,

> A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce

> a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage -- or force -- further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base.

Testimony of Matthew M. Lind, reproduced in *PBGC* v. *R.A. Gray & Co.*, 467 U.S. at 722-723 n.2.

To alleviate this problem, MPPAA imposes "withdrawal liability" on employers that leave multiemployer plans in ways that reduce the plan's contribution base. 29 U.S.C. § 1381. At the same time, MPPAA provides safe harbors for employers who sell businesses (or make other corporate changes) in ways that do not reduce the contribution base. The first safe harbor, 29 U.S.C. § 1384, provides that an employer that ceases to contribute to a multiemployer plan as a result of a sale of assets will not be subject to withdrawal liability if it takes specified steps to ensure that the asset purchaser will continue to contribute to the plan.

The second safe harbor, 29 U.S.C. § 1398, provides that an employer will not be subject to withdrawal liability as a result of certain changes in corporate structure described in 29 U.S.C. § 1362(d) if "the change causes no interruption in employer contributions or obligations to contribute under the plan." The changes in corporate structure described in § 1362(d) include the sale of the stock of a subsidiary:

> A withdrawal does not occur, however, where an employer ceases to exist merely by reason of a change in form or structure, as long as the employer is replaced by a successor employer and there is no interruption in the successor employer's contributions to the plan or obligation to contribute under

> the plan. For example, if P Corporation owns 100 percent of the stock of S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change in ownership of S.

H. R. Rep. No. 869, Pt. II, 96th Cong., 2d Sess. 16 (1980), reprinted in [1980] U.S.C.C.A.N. 3005-3006. See also *Teamsters Pension Trust Fund* v. *Central Mich. Trucking, Inc.*, 857 F.2d 1107, 1109-1110 (6th Cir. 1988); *Dorn's Transp., Inc.* v. *Teamsters Pension Trust Fund*, 787 F.2d 897, 900-902 (3d Cir. 1986); PBGC Opn. Ltr. 92-1 (Mar. 30, 1992); PBGC Opn. Ltr. 82-4 (Feb. 10, 1982).

These two safe harbors, which were designed to "moderate and mitigate" the statute's operation (*Connolly* v. *PBGC*, 475 U.S. 211, 225-226 & n.8 (1986)), are critical to the delicate balance Congress sought to achieve in enacting MPPAA. In order to check the erosion of the contribution bases of multiemployer plans, MPPAA imposes withdrawal liability on employers that cease to contribute on behalf of their employees. But the statute recognizes that changes in ownership will occur, and it *allows* employers to avoid withdrawal by complying with the safe harbor rules and arranging for the new owner to assume the seller's contribution obligations.

MPPAA thus embodies a classic carrot-and-stick approach. If an employer withdraws from a multiemployer pension plan and does not make arrangements for another to assume its contribution obligations, it is subject to withdrawal

liability, a sum that approximates not merely "the vested but unfunded benefits of the employer's employees" (App., *infra*, 1a), but a potentially much larger amount that includes a share of unfunded benefits attributable to employees of other employers.[3/] But if the employer structures the sale-of-business transaction in a way that complies with one of the safe harbor provisions and passes the contribution obligation on to the purchaser, no withdrawal is deemed to occur and no withdrawal liability may be assessed.

At the same time, Congress was concerned that corporate transactions could be abused, "leaving the other employers in the multiemployer pension plan holding the bag" (App., *infra*, 7a). To deal with these abuses, Congress included § 1392(c), which provides that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction." Looking at § 1392(c) in isolation, and reading "principal purpose," "transaction," and "evade or avoid" expansively, it is possible to interpret the section to apply whenever a company structures a sale-of-business transaction to come within either of the statutory safe harbors and thus to "avoid" withdrawal liability. But that interpretation would make the safe harbors illusory and is contrary to the clear meaning of the statute taken as a whole.

[3/] For a variety of reasons, some multiemployer plans are greatly underfunded, and an employer withdrawing from such a plan may be exposed to withdrawal liability totally out of proportion to "the vested but unfunded benefits of [that] employer's employees." See, *e.g.*, *Central States, S.E. & S.W. Areas Pension Fund* v. *Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1343 (7th Cir.), cert. denied, 113 S. Ct. 179 (1992) (withdrawal liability assessed in the case is "wholly disproportionate to the cost -- quite possibly zero -- that the withdrawal imposed on the pension fund").

Congress did not intend § 1392(c) effectively to nullify § 1384 and § 1398. Section 1392(c) serves a much narrower purpose: to prevent employers from avoiding withdrawal liability through transactions that do not have any real economic substance, other than to avoid withdrawal liability. Representative Frank Thompson, the chief sponsor of MPPAA in the House, explained § 1392(c) as follows:

> We intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form or control, or through transactions which are less than bona fide and arms length. Hence, for example, a building and construction industry employer -- or for that matter any employer contributing to a plan -- will not be able to evade withdrawal liability by going out of business and resuming business under a different identity.

126 Cong. Rec. 23038 (1980). It is telling that in 1992, when Congress passed a law to protect the health insurance benefits of retired coal miners, it included a provision identical to § 1392(c) under the heading "Sham Transactions." See 26 U.S.C. § 9722.

The court of appeals made no effort to reconcile its conclusion that Santa Fe violated § 1392(c) by structuring the divestiture of SFTT as a stock sale in order to prevent withdrawal liability with the explicit provisions of § 1398 and § 1384 allowing an employer to avoid withdrawal liability by structuring transactions in accordance with those sections. By considering § 1392(c) in isolation, and thereby giving it a meaning that effectively obliterates two other sections of the same statute (§ 1398 and § 1384), the court of appeals reached a result that completely frustrates Congress's purpose in including the safe harbors in MPPAA.

As this Court has frequently recognized, courts interpreting statutory provisions must consider the statute as a

whole, and cannot look only at the particular words or section at issue:

> We believe it fundamental that a section of a statute not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy."

Richards v. *United States*, 369 U.S. 1, 11 (1962), quoting *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 285 (1956). See also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987), applying the rule in a case interpreting ERISA. A closely related (and equally sensible) canon of construction is that courts should avoid construing one part of a statute in a way that denies effect to another part of that law. *Rake* v. *Wade*, 113 S. Ct. 2187, 2192 (1993). See also *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (federal statute should not be read so as to "destroy itself").

The Seventh Circuit's interpretation of § 1392(c) in this case disregards both of those fundamental rules of statutory construction. The court read § 1392(c) in isolation, without considering the larger context of MPPAA including the two statutory safe harbors. By considering § 1392(c) in isolation, the court of appeals interpreted that section in a completely nonsensical way that deprived § 1384 and § 1398 of any practical effect.

II. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE INTERPRETATION OF THE PBGC

In light of the language of the statute taken as a whole and its legislative history, it is hardly surprising that the PBGC -- the agency that sponsored MPPAA and is charged with its enforcement -- has interpreted § 1392(c) to permit the deliberate use of the two statutory safe harbors. In 1985, a

company asked for the PBGC's opinion regarding the sale of one of the company's divisions in a transaction that was going to be structured either as a sale of assets in conformity with § 1384 or as a sale of the stock of a newly incorporated subsidiary under § 1398. PBGC Opn. Ltr. 85-15 (May 31, 1985). In either case, the "sole purpose" for the proposed structure of the transaction would be to avoid withdrawal liability. The company asked whether the pension plan, in light of the company's admitted purpose, could "disregard these transactions and impose liability on the seller because the sale violates the 'principal purpose' rule of Section 1392(c)?"[4/]

The PBGC advised the company that neither form of the transaction would trigger withdrawal liability, even though the "sole purpose" for each was to prevent the assessment of withdrawal liability (PBGC Opn. Ltr. 85-15, at 1-2):

> The purpose of Congress in providing Section 1384 was to allow an employer to avoid liability if a sales transaction meets the statutory conditions. Thus, the application of Section 1384 to a sales transaction does not by itself violate Section 1392(c). * * * Likewise, as PBGC Opinion Letter 82-4 explains, the sale of the stock of a subsidiary is permitted without liability being incurred under the Act. Thus, if a division of a corporation is first incorporated and then sold, the transaction does not automatically violate Section 1392(c).[5/]

[4/] The PBGC Opinion Letter, like other ERISA authorities, uses the ERISA section numbers throughout, rather than the United States Code numbers. For consistency's sake, we have made the conversion to the United States Code section numbers.

[5/] PBGC Opn. Ltr. 82-4 (Feb. 10, 1982) advised that a sale of stock of a corporate subsidiary is a change in form or structure under § 1398 and does not trigger withdrawal liability.

As to both possible forms of the transaction -- asset sale or stock sale -- the PBGC advised the company that *other* circumstances might exist warranting the application of § 1392(c). But the fact that "the sole purpose" for the *structure* of the transaction was to avoid withdrawal liability did not, by itself, "automatically violate" § 1392(c). As this Court has recognized, the PBGC's interpretation of ERISA is entitled to substantial deference. *PBGC* v. *LTV Corp.*, 496 U.S. 633, 647-648 (1990); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 726 (1989). Deference to the PBGC is particularly appropriate with regard to MPPAA, which was the product of the PBGC's study and recommendations. *Berkshire Hathaway, Inc.* v. *Textile Workers Pension Fund*, 874 F.2d 53, 55 (1st Cir. 1989).

The court of appeals' decision is flatly inconsistent with the PBGC's interpretation of the statute. The court held that even though Santa Fe decided to divest itself of SFTT "for reasons unrelated to withdrawal liability" (App., *infra*, 4a), because Santa Fe decided to structure the transaction as a sale of stock in order to prevent the assessment of withdrawal liability, the transaction was contrary to § 1392(c). *Id.* at 4a, 7a. In the situation examined by the PBGC, the "sole purpose" for structuring the transaction as a stock sale or a § 1384 asset sale was to prevent the assessment of withdrawal liability, yet the agency Congress empowered to interpret and apply MPPAA advised that the transaction would *not* violate § 1392(c). Review by this Court is needed to choose between those diametrically opposite interpretations of this important statute.

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THE THIRD, SIXTH AND NINTH CIRCUITS

Like the PBGC, *all* of the courts to consider § 1392(c) prior to this case have construed the provision narrowly, in a way that would not nullify the statutory safe harbors for bona fide sales of businesses and other transactions.

A good example is Judge Becker's opinion for the Third Circuit in *Dorn's Transp., Inc.* v. *Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986). Dorn's Transportation, a trucking company that was obligated to contribute to the Teamsters Pension Trust Fund, was sold to another trucking concern, Oneida Motor Freight. The transaction was structured as a § 1398 sale of stock. The pension plan nevertheless attempted to assess withdrawal liability against Dorn's, arguing that a principal purpose of the transaction was to evade or avoid withdrawal liability. The court of appeals, assuming *arguendo* that the seller "entered into the transaction with Oneida in order to escape withdrawal liability" (787 F.2d at 902), held that § 1392(c) did not apply. The court pointed out that "the buyer [had] no intention of taking subsequent actions that [would] reduce the payments owing to the Plan," and that "it does not appear that a 'principal purpose of the transaction' as a whole is to escape liability." Thus, "the kind of bad faith that § 1392 guards against is not at issue in this case." *Ibid.*

The critical facts of *Dorn's Transportation* were virtually identical to those assumed by the panel in this case: a sale-of-stock transaction, a seller that structured the transaction as a stock sale in order to prevent the assessment of withdrawal liability, and a sale to a legitimate buyer that assumed the obligation to contribute to the multiemployer plan. Under those facts, the Third Circuit held that there was no liability, and that § 1392(c) did not come into play, exactly the opposite of the Seventh Circuit's conclusion in this case. See also *Flying Tiger Line* v. *Teamsters Pension Trust Fund*, 830 F.2d 1241, 1247, 1254 (3d Cir. 1987) (characterizing § 1392(c) as a "sham transaction" rule that is triggered by a showing of "bad faith").

Another factually indistinguishable case, *Teamsters Pension Trust Fund* v. *Central Mich. Trucking, Inc.*, 698 F. Supp. 698 (W.D. Mich. 1987), aff'd, 857 F.2d 1107 (6th Cir. 1988), involved a § 1398 divestiture of a trucking subsidiary.

The district court and the court of appeals held that the Fund's § 1392(c) claim should be decided by an arbitrator. Both courts made it clear that to come within § 1392(c), the Fund would have to prove that the divestiture was a sham transaction. The district court held that "if a transaction or change in corporate structure was not a sham, and if a successful change in corporate structure was accomplished without incurring contemporaneous withdrawal liability, then withdrawal liability cannot be assessed against the predecessor corporation upon failure or withdrawal of the successor." 698 F. Supp. at 703. The Sixth Circuit affirmed "for the reasons set forth fully in the district court's opinion." 857 F.2d at 1109.

In this case, it is undisputed that Santa Fe's sale of SFTT to RSI was a bona fide, arm's-length transaction. Accordingly, under the Third and Sixth Circuit's analysis, even if the transaction was structured to avoid withdrawal liability, it would come within the § 1398 safe harbor. It is clear that the Third and Sixth Circuits would have held that the SFTT transaction in this case did not violate § 1392(c).

The Ninth Circuit interpreted § 1392(c) in the same narrow manner (albeit in a different factual context) in *Cuyamaca Meats, Inc.* v. *Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). Cuyamaca Meats and two other meatpacking employers were obligated to contribute to the Pension Trust Fund under a collective bargaining agreement that expired on March 31, 1983. The parties failed to agree on a new labor contract. The employers' final offer included a proposal that they would cease to contribute to the Fund. 827 F.2d at 494. But after they made that "final" offer, the employers learned that the market value of the Fund's assets had increased sharply since the end of the last plan year, and that if they could postpone withdrawal until after the end of the plan year (June 30, 1983), the withdrawal liability would be reduced by nearly a million dollars. *Ibid.* The employers therefore

changed their final offer, proposed to continue contributing to the Fund until August 31, 1983, and implemented that final offer when the bargaining reached an impasse. *Id.* at 495.

The employers conceded that a purpose of the modified final offer was to reduce their withdrawal liability, and the court of appeals assumed that was a principal purpose of the offer. 827 F.2d at 499. Nevertheless, the court held that the transaction was not covered by § 1392(c). Affirming the district court's view that "section 1392(c) was directed at essentially fraudulent maneuvers lacking in economic substance" (638 F. Supp. at 890), the court of appeals concluded that the offer "had economic substance" and "was a bona fide, arm's-length offer." 827 F.2d at 499. Even though the principal purpose of the offer may have been avoidance of withdrawal liability, the court held that it did not come within the meaning of § 1392(c). *Ibid.*

These decisions -- and the PBGC Opinion Letters -- cannot be reconciled with the court of appeals' decision in this case. More important, they reflect the logical interpretation of § 1392(c), taking into account and reconciling the three sections of MPPAA. Section 1392(c) could not have been intended to nullify the statutory safe harbors prescribed in §§ 1384 and 1398, two other sections of the same law.

Put another way, § 1392(c) focuses on the transaction in its entirety, and not merely on the form of the transaction. In this case, there is no question that Santa Fe sold SFTT for sound business reasons unrelated to withdrawal liability. App., *infra*, 4a, 7a. The fact that Santa Fe *structured* that transaction to *comply* with § 1398 (and thus not to trigger withdrawal) does not run afoul of § 1392(c), any more than it would if Santa Fe had deliberately structured the transaction to comply with § 1384. The court of appeals' ruling confuses intent to *invoke* the statute's safe harbor with intent to *evade* statutory liabilities.

The court of appeals' sweeping construction of Section 1392(c) will create serious practical problems for all businesses that attempt to sell subsidiaries subject to MPPAA, frustrating Congress's purpose to "protect[] the solvency and viability of pension plans with the least practicable intrusion into normal business transactions." *Central States, S.E. & S.W. Areas Health & Welfare Fund* v. *Cullum Cos.*, 973 F.2d 1333, 1340 (7th Cir. 1992) (describing Congressional policy to prescribe "safe harbors" under the Act). Review by this Court is essential to resolve the conflict and to make it clear that § 1392(c) is not at odds with § 1384 and § 1398.

IV. THE COURT OF APPEALS' DECISION DISRUPTS THE SETTLED UNDERSTANDING OF THE OPERATION OF MPPAA IN SALE-OF-BUSINESS TRANSACTIONS

In this case, Central States first assessed withdrawal liability against Santa Fe in December 1987. Thus, fully 3-1/2 years after the sale of SFTT, Central States called into question a basic economic assumption underlying the transaction.[6/] Thousands of companies contribute to multiemployer pension plans, and many of those plans are underfunded.[7/]

[6/] ERISA does not place any time limits on withdrawal liability assessments, requiring only that notice be given "as soon as practicable." 29 U.S.C. § 1399(b). Assessments of withdrawal liability several years after the withdrawal have been upheld. See, *e.g.*, *Korman Corp.* v. *Teamsters Pension Trust Fund*, 10 Emp. Ben. Cases 1608 (Arb. 1988); *Building Services Employees Pension Trust* v. *Ogden Allied Services Corp.*, 10 Emp. Ben. Cases 1401 (Arb. 1988).

[7/] According to the PBGC's most recent Annual Report, there are about 2,000 multiemployer pension plans covering 8.9 million individuals. PBGC, 1993 ANNUAL REPORT 22. Although a multiemployer plan may have as few as two participating employers (29 U.S.C. § 1002(37)(A)), most multiemployer plans are much larger than that, with the largest (Central States) having over 10,000 contributing employers. "Teamsters Central States Fund Trustees

Given the frequency with which sale-of-business transactions occur, there can be no question that the Seventh Circuit's ruling affects a large number of closed transactions and will affect an even larger number of future transactions. Ever since MPPAA introduced the prospect of withdrawal liability, the accepted interpretation has been that the proper and lawful way to prevent the imposition of withdrawal liability upon the sale of a contributing employer is to structure the transaction as a sale of assets conforming to § 1384 or a sale of stock conforming to § 1398. That settled interpretation -- which has been a critical element of countless sale-of-business transaction since 1980 -- is abruptly cast aside by the court of appeals' decision.

The negotiations that take place when an employer that contributes to a multiemployer plan is sold are described in Shecter, "Acquiring Corporate Assets Without Successor Liability: Is It A Myth?," 1986 COLUM. BUS. L. REV. 137, 164:

> The most obvious example of structuring the deal is the decision whether to purchase assets or stock. For example, a seller with a unionized workforce facing potentially large liability under ERISA in connection with a withdrawal from a multi-employer pension plan may press for a sale of stock rather than assets. The seller will often urge that approach, first, to ensure that the sale transaction itself does not trigger liability and, second, so that the seller will have no continuing secondary

---

Select Morgan Stanley As Assets Manager," 10 BNA PENSION RPTR. 1784 (Nov. 28, 1983). By recent estimate, approximately 20% of multiemployer plans are underfunded, with a total underfunding of about $11 billion. Testimony of Robert M. Spira before the Senate Finance Committee, reprinted in FEDERAL DOCUMENT CLEARING HOUSE CONG. TESTIMONY, June 15, 1994 (citing 1992 PBGC report).

> liability under the multiemployer plan provisions of ERISA for any subsequent major layoff of employees or shutdown of the business by the purchaser during the five years following the sale. By contrast, where a purchaser wants to avoid any liability to employees, plan beneficiaries, or the Pension Benefit Guaranty Corporation (the "PBGC") under Title IV of ERISA for an underfunded pension plan maintained solely by a nonunion target company, such a purchaser may insist on a sale of assets, not stock, and such a purchaser may refuse to adopt the plan or to assume its assets or liabilities.

These negotiations reflect the consistent advice given in treatises, seminars, articles and other practitioners' guides: a transaction deliberately structured as a sale of stock does not constitute a withdrawal and therefore does not trigger withdrawal liability. As one article put it:

> Normally, an employer's contribution obligation is transferred to another party in connection with the sale of a subsidiary or division. Whether a withdrawal occurs in those situations depends almost exclusively on the form of that transfer. If the transaction takes the form of a sale of the contributing employer's stock, no withdrawal occurs because there normally is no change in the identity of the contributing employer.

Kladder, "Asset Sales After MPPAA -- An Analysis of ERISA Section 4204," 39 BUS. LAW. 101, 102 (1983). Another commentator made the same point as follows:

> *Stock Acquisitions*: A sale of stock of a contributing business does not cause a withdrawal -- all of the potential liability, together with the contribution history which is used to measure future withdrawals, are transferred to the buyer. Once transferred to the buyer, the liability belongs to the buyer's "con-

> trolled group of corporations," and the seller's "controlled group" is off that hook, or that portion of the hook.

Cummings, "Employee Benefit Liabilities Upon Transfer of Ownership," BNA PENSION RPTR. 876, 879-880 (June 24, 1985). See also Griffey, Gorman & Curtis, "Employee Benefit Plans In Corporate Acquisitions, Dispositions and Mergers," in H. Shecter (ed.), ACQUIRING OR SELLING THE PRIVATELY HELD COMPANY 273, 318-319 (Practising Law Institute 1993) ("Sale of stock does not trigger liability as long as there is no interruption in the obligation to contribute to the plan"); Cummings, "Labor Relations and ERISA: Considerations In Corporate Change (Mergers, Acquisitions, Bankruptcy)," in ALI-ABA, LABOR AND EMPLOYMENT LAW 1787, 1790 (6th ed. 1992) ("Stock [a]cquisition * * * will not cause a withdrawal"); "PBGC Involvement in Bankruptcy Discussed at Bar Association Conference," BNA PENSION RPTR. 540, 541 (Mar. 20, 1989) ("the sale of a company's stock does not cause a withdrawal"); Perry, "Mergers and Acquisitions: Buyers Beware," 36 RISK MANAGEMENT 66 (Nov. 1989) ("A stock sale does not trigger withdrawal liabilities"); Kershaw, "Multiemployer Plans -- Special Rules," 359-3d TAX MANAGEMENT PORTFOLIO IIIsA (1993); ABA, EMPLOYEE BENEFITS LAW 773-775 (1991). The frequency with which this issue is discussed in the treatises and legal periodicals reflects the recurring nature of the issue and its general importance to the business community.

Santa Fe agrees with the advice given by these and many other authorities. But whether or not they are correct, they plainly reflect a common understanding of the operation of MPPAA -- an understanding that is placed in doubt by the Seventh Circuit's decision. Because that understanding has played a central role in numerous completed sale-of-business transactions, and because it is essential that the parties to future transactions be able to predict the liabilities involved, this Court should grant the petition and resolve the conflict

between the Seventh Circuit's decision and prior rulings of the PBGC and three other circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

David C. Gustman
Harry L. DeLung, Jr.
Weston W. Marsh
Freeborn & Peters
311 South Wacker Drive
Chicago, Illinois 60606
(312) 360-6000

James D. Holzhauer
Counsel of Record
Stephen M. Shapiro
Kenneth S. Geller
Angela K. Dorn
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

September 1994

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SANTA FE PACIFIC CORPORATION,
Plaintiff-Appellee,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, Defendant-Appellant.

Nos. 93-2736, 93-2899.

Argued Feb. 10, 1994.

Decided April 22, 1994.

Rehearing and Suggestion for Rehearing En Banc Denied June 10, 1994*.

Before POSNER, Chief Judge, and ESCHBACH and KANNE, Circuit Judges.

POSNER, Chief Judge.

Under the Multiemployer Pension Plan Amendments Act of 1980, an employer that withdraws from a multiemployer pension plan can be forced to pay the plan a sum approximating the vested but unfunded benefits of the employer's employees. 29 U.S.C. §§ 1381 *et seq.* The purpose of this "withdrawal liability," which is enforceable in a suit by the pension plan with issues of fact resolved by an arbitrator subject to review by the district court for clear error (*see* 29 U.S.C. §§ 1401(b)(2), (c), 1451, as glossed in *Chicago Truck Drivers, Etc. Pension Fund v. Louis Zahn Drug*

---

* Hon. Walter J. Cummings took no part in the consideration of the suggestion for rehearing En Banc.

Co., 890 F.2d 1405, 1411 (7th Cir.1989)), is to protect the other employers in the multi-employer plan from having to pay for those benefits. *Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1340 (7th Cir.1992). A parent and its subsidiaries are treated as one employer for this purpose, 29 U.S.C. § 1301(b)(1); so if a subsidiary withdraws from the plan, its withdrawal liability can be assessed against the parent. § 1381(a). If, however, rather than causing the subsidiary to withdraw the parent sells the subsidiary, the parent is not liable for withdrawal liability of the subsidiary unless "a principal purpose" of the transaction was to "evade or avoid" parental liability. § 1392(c).

In 1984, in a leveraged buyout, Santa Fe Pacific Corporation sold a trucking subsidiary—the Santa Fe Trails Transportation Company (SFTT)—that was a member of the Central States multiemployer pension plan. The purchaser, a rail freight consolidator, went broke a year later, whereupon Central States assessed a withdrawal liability of $7.6 million against Santa Fe to fund the vested pension benefits of SFTT's employees. Santa Fe challenged the assessment and the matter was referred to arbitration. The arbitrator, a nonlawyer selected by the parties from a panel, established by the American Arbitration Association, of specialists in withdrawal-liability arbitrations, thrice found that avoidance of withdrawal liability had *not* been a principal purpose of the sale. The first two times the district judge remanded the case to the arbitrator, finding the opinions he had written in support of his conclusion utterly unsatisfactory. The third time the judge, with evident reluctance, upheld the arbitrator, precipitating this appeal.

The issue is purpose, a state of mind inferred from testimony and other evidence. The arbitrator heard testimony for fifteen days and reviewed innumerable documents, and even if the statute did not require the district court (and this court) to accord substantial deference to the arbitrator's judgment, such deference would be the counsel of prudence. But despite the impression that may have been conveyed by some colorful language in *Parts & Electric Motors, Inc. v. Sterling Electric Inc.*, 866 F.2d 228, 233 (7th Cir.1988), where we said that a finding to be deemed clearly erroneous must stink like a "five-week-old, unrefrigerated dead

fish," the clear-error standard is not a rubberstamp, even when the trier of fact is called an arbitrator rather than a judge. (The review of an arbitrator's findings is normally much more limited than that of a judge's findings, *see, e.g., DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163, 1166-67 (7th Cir.1994); *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry.*, 768 F.2d 914, 921-22 (7th Cir.1985), but Congress departed from the norm in the Multiemployer Pension Plan Amendments Act.) A finding is clearly erroneous if the reviewing court, after duly acknowledging the superior proximity of the factfinder to the witnesses, is firmly convinced that the finding is erroneous. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2279-80 (1993); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985).

The imposition of withdrawal liability in a sale of business situation requires only that *a* principal purpose of the sale be to escape withdrawal liability. It needn't be the only purpose; it need only have been one of the factors that weighed heavily in the seller's thinking. We can find no decisions discussing situations in which there is more than one principal (major, weighty, salient, important) purpose, but we would be doing violence to the language and the purpose of the statute if we read "a principal" as "the principal." The clear import of "a principal" is to let the employer off the hook even if one of his purposes was to beat withdrawal liability, provided however that it was a minor, subordinate purpose, as distinct from a major purpose. To let the employer off even if avoiding such liability was a major purpose would ill serve the statute's goal of preventing one employer from unloading his pension obligations onto the other employers in a multiemployer plan.

There can be no serious doubt that withdrawal liability was one of the principal considerations in the decision to sell SFTT. It is true that officials of Santa Fe denied this in their testimony before the arbitrator, yet his three opinions contain only one finding with respect to credibility; he believed the testimony of Santa Fe's president that concern with the effect on morale of firing the rest of SFTT's employees incident to a sale of all its assets and with difficulties in making asset sales weighed heavily

in the decision to sell the stock rather than assets of the subsidiary. But the arbitrator's judgment that therefore avoiding withdrawal liability was not "a principal purpose" of the transaction is an inference from the testimony (and other evidence), not the testimony itself. We therefore need not decide whether this is one of those rare cases in which irreconcilable conflict between oral testimony on the one hand and indubitable documentary evidence and admissions on the other entitles the reviewing court to reject the credibility determinations of the trier of fact. *Bullard v. Sercon Corp.*, 846 F.2d 463, 466 (7th Cir.1988); *Winchester Packaging, Inc. v. Mobil Chemical Co.*, 14 F.3d 316, 319 (7th Cir.1994). We can reject the district judge's factual inferences from testimony only if they are clearly erroneous, but they do not have the additional insulation from appellate review that determinations of credibility enjoy.

Proper analysis of the case requires distinguishing between two different desires of Santa Fe. One was to rid itself of SFTT. The other was to sell SFTT. These sound alike but are different. There is no doubt that for reasons unrelated to withdrawal liability Santa Fe wanted to get rid of the subsidiary, which it described as being "among the living dead" because of the seismic changes in the transportation industry caused by deregulation. But the sale of the subsidiary as a going concern, as by selling the stock of SFTT, was only one possible method of getting rid of the subsidiary. The other was to sell off its assets, either piecemeal or in a lump. Santa Fe had set forth on this road, closing down a large part of SFTT, selling 57 percent of SFTT's trucks and discharging 44 percent of its employees in the process (thus already incurring a risk of withdrawal liability, for the risk arises whenever an employer discharges a substantial fraction of its employees who have vested but unfunded benefits in a multiemployer pension plan, *see* 29 U.S.C. § 1385, and later SFTT actually rehired some of these discharged employees to avoid the risk of withdrawal liability), when in 1982 it began a systematic consideration of the fate of what remained of SFTT. The options were quickly narrowed to two: sell the assets; sell the stock. The first route, it was estimated, would bring in more money. The subsidiary had been losing money (the president of Santa Fe called SFTT "a perennial loser"); the prospects for a turnaround were not good;

its value as a going concern was therefore less than its salvage value. The difference in the estimated yields of the alternative methods of disposition would have provided a strong, perhaps a compelling, inducement to go the liquidation route but for the prospect of withdrawal liability. One consultant advised Santa Fe in 1981 that "pension fund liability," which the consultant estimated at $10.5 million, "is a major stumbling block in implementing the liquidation of SFTT's operation." The president of Santa Fe testified that this report was "my first sort of hit with a 2 by 4 about MPAA." We know that the vested but unfunded pension benefits of SFTT's employees would later be estimated by Central States at $7.6 million, and this is the estimate of the liability to Central States alone; SFTT had some, though much less, withdrawal liability to other multiemployer pension plans. When the fate of SFTT was being discussed within Santa Fe, the amount of the potential withdrawal liability was uncertain but it was believed to be at least several million dollars and possibly more than $11 million, so that if it could be avoided by sale of the stock of SFTT rather than its assets this might be the more profitable route to take after all, even though it would have been the less profitable route in the absence of any danger of withdrawal liability.

Internal documents that cannot be explained away make clear that Santa Fe's management was both aware of the company's potential withdrawal liability (the "spectre of the Multi-Employer Pension Plan Act, which imposes liability for withdrawal from the teamster retirement plan," as one document describes it) and aware that a sale of the company might avoid it. As Santa Fe's president wrote the chairman of the board in 1983, "If a purchaser [for SFTT] can be located, there is a good possibility of transferring part or all of a rather substantial liability which the company is incurring under the Multiemployer Pension Plan Amendments Act." A lawyer for Santa Fe reminded the company's general counsel that "Due to MPPAA considerations among other things, you advised him [a prospective purchaser of SFTT] that we were seeking a large, financially strong purchaser." This lawyer's notes of one meeting of the selling team report that the team was considering "desperation moves," including "selling it [SFTT] to someone in trouble."

The situation, in short, was that by selling the stock rather than the assets of the subsidiary Santa Fe stood to avoid millions of dollars in withdrawal liability, whereas without that potential liability the sale of the assets would have brought a higher price. In this situation the inference that withdrawal liability figured heavily in the company's decision to sell the stock is well-nigh irresistible. Obviously a purpose for the sale of stock is "principal" if, were it absent, the sale would not have taken place. It follows that a principal purpose of the sale of SFTT's stock *must* have been to avoid withdrawal liability unless, somehow, the other considerations favoring a sale of stock over a sale of assets were so compelling that they reduced the avoidance of withdrawal liability to a minor consideration because the sale of stock would have taken place even if the MPPAA had never been passed. Certainly if SFTT had had much greater value as a going concern than on the auction block, and if a sale of stock as in a leveraged buyout was a much more feasible method of preserving the subsidiary as an intact concern than a cash sale of the assets or a merger (which is a form of asset acquisition), it might be reasonable to infer that withdrawal liability was only a minor factor in Santa Fe's thinking. But on the contrary, the subsidiary was worth considerably more as a conglomeration of assets than as a going concern.

Santa Fe's president testified, as we mentioned, that despite the difference in yields he preferred the stock sale because he feared the impact on the morale of Santa Fe's remaining workers if it fired all of SFTT's employees, as it planned to do when the terminals and other assets that these workers worked in or with were sold. The testimony was not backed up by any of the extensive documentary evidence generated in Santa Fe's protracted consideration of alternative methods of disposing of the subsidiary. Having already discharged almost half its work force, SFTT could not plausibly be considered overly concerned with employee morale. But even if the president's testimony is taken at face value, at most it establishes that the avoidance of withdrawal liability was not the only consideration in the structuring of the transaction, not that avoidance did not play an important role in the decision.

At oral argument Santa Fe's able counsel emphasized a second factor—that the yield from a piecemeal liquidation could not be known for sure in advance, could not in fact be known for sure until the last asset had been sold. This is a plausible point, but since it was not mentioned in any of the planning documents, it can hardly be thought a purpose for the sale that either by itself or in conjunction with the concern about employee morale assumed such transcendent importance in the minds of Santa Fe's managers as to push those millions of dollars of potential withdrawal liability into the shade.

The arbitrator's treatment of these issues was entirely inadequate. Most of his third opinion, the one the district judge reluctantly upheld, is devoted to irrelevant questions, such as whether Santa Fe had reasons independent of withdrawal liability to divest itself of SFTT and whether it knew that the purchaser of SFTT was likely to flop. The issue is not whether Santa Fe had compelling reasons independent of withdrawal liability to divest itself of SFTT; that is a given. The issue is the *form* the divestiture took—a sale of stock rather than of assets. The statutory criterion is not whether the transaction is a sham, having no purpose other than to defeat the goals of the Multi-employer Pension Plan Amendments Act by leaving the other employers in the multiemployer pension plan holding the bag. It is whether the avoidance of withdrawal liability by the seller (not necessarily by the purchaser as well) is one of the principal purposes of the transaction. To that central issue the arbitrator devoted a single, short paragraph, in which he remarks that if SFTT had been closed down "there would have been a serious loss of jobs" and that "selling of assets causes numerous problems that can go on for some time." That is the whole meat of the opinion—of the three opinions in fact. It does not justify the arbitrator's conclusion that the avoidance of withdrawal liability was not one of the principal purposes of the transaction.

At argument the question arose whether a reviewing court has the inherent power, corresponding to the power that our circuit rule 36 gives us in remanding cases to district courts, to direct that an arbitral matter that must be remanded be remanded to a different arbitrator. This was done in *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*, 969 F.2d

1436, 1446 (3d Cir.1992), but without discussion of the court's power to do so. The issue is moot. The arbitrator has died, and Rule 14 of the American Arbitration Association (under whose auspices the arbitration was conducted) establishes a mechanism for the appointment of a new arbitrator in such a case. If necessary. The record permits only one conclusion concerning the issue under appeal—that a principal purpose of the sale of SFTT's stock was to avoid withdrawal liability—and we are not aware that Santa Fe is contesting the amount of withdrawal liability that Central States determined or the method of assessing interest on it, but this is a matter that can be straightened out in the district court.

The judgment of the district court is reversed and the case remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SANTA FE PACIFIC CORPORATION,
Plaintiff-Appellee,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, Defendant-Appellant.

Nos. 93-2736, 93-2899.

June 10, 1994

Before POSNER, Chief Judge, and ESCHBACH and KANNE, Circuit Judges.

ORDER

On May 6, 1994, plaintiff-appellee filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges* has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

---

* Hon. Walter J. Cummings took no part in the consideration of the suggestion for rehearing en banc.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SANTA FE PACIFIC CORPORATION,
formerly known as SANTA FE
SOUTHERN PACIFIC CORPORATION,

Plaintiff,

v.

THE CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS PENSION
FUND,

Defendant.

No. 92 C 0677
Hon. Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

This matter is before us upon the parties' Second Renewed Cross Motions for Summary Judgment. For the reasons set forth below, Santa Fe's Motion for Summary Judgment to confirm the arbitration Award is granted in its entirety. Central State's Motion for Summary Judgment to Vacate the Award and enter judgment in its favor is denied.

Background

This case involves pension fund withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). 29 U.S.C. § 1381. The facts of this case are covered *ad nauseam* in our earlier opinions and in the briefs of the parties. After extensive proceedings, the sole remaining issue is whether Santa Fe's sale of its subsidiary, Santa Fe Trail

Transportation Company ("SFTT"), had as a principal purpose the avoidance or evasion of pension fund withdrawal liability.

The MPPAA provides that "[a]ny dispute between an employer and the sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration." 29 U.S.C. § 1401(1).[1] In the present case, after Central States notified Santa Fe of its determination that it was liable, Santa Fe made a timely demand for arbitration. After extended evidentiary proceedings, on January 1, 1992, Arbitrator Robert Mitrani issued a fifty-two page award, finding in favor of Santa Fe on all issues.

We have twice remanded this matter to the arbitrator for clarification of his Award in favor of Santa Fe. On the first occasion, we determined that it was unclear whether the arbitrator had applied the correct legal standard in finding that Santa Fe's sale of SFTT did not result in withdrawal liability under MPPAA. Thus, we remanded the case to the arbitrator to determine whether Santa Fe had, as a "principal purpose," the intent to evade or avoid pension fund liability when it sold SFTT. 29 U.S.C. § 1392(c). *See Santa Fe v. Central States*, No. 92 C 0677, slip op. (N.D. Ill. filed August 20, 1992) (Plunkett, J.).

Arbitrator Mitrani issued a Supplemental Opinion and Award on December 15, 1992, again finding in favor of Santa Fe. The parties filed another round of motions. Yet again, we vacated the award and remanded the matter to the arbitrator for clarification of the reasons he rejected what we felt was strong evidence that Santa Fe was subject to withdrawal liability. *See Santa Fe v. Central States*, No. 92 C 0677 (N.D. Ill. filed March 9, 1993) (Plunkett, J.)

On April 22, 1993, the arbitrator issued yet another Award in favor of Santa Fe. Of course, the parties have filed another round of summary judgment motions. Today, we must decide

---

[1] For a discussion of the relevant history and role of the MPPAA, *see Santa Fe v. Central States*, No. 92 C 0677 (N.D. Ill. filed August 20, 1992) (Plunkett, J.).

whether Arbitrator Mitrani's Second Amended Award is sufficient as a matter of law.

Discussion

Under the MPPAA, the arbitrator's decision is entitled to substantial deference as a matter of law: "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c). The "clear preponderance" standard has been interpreted by the Seventh Circuit as functionally equivalent to the more familiar "clearly erroneous" criterion. *Chicago Truck Drivers Pension Fund v. L. Zahn Drugs*, 890 F.2d 1405, 1411 (7th Cir. 1989).

Thus, we have treated Arbitrator Mitrani's findings with considerable deference. Under the clearly erroneous standard, we are not free to disturb the holding below merely because we have doubts about its wisdom or think we may have reached a different result. Rather, "[t]o be clearly erroneous, a decision must strike us as more than just maybe wrong; it must . . . strike us as wrong with the force of a five-week-old unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988). Despite this high standard of deference, in our March 9 Opinion, we held that "'[e]ven if the reek of "five-week-old unrefrigerated dead fish' is not present . . . there is a definite and unpleasant effluvium that wafts about the December 15 Award." Slip op. at 9 (citation omitted).

Arbitrator Mitrani's Second Amended Opinion and Award does address many of our concerns. Indeed, it explains the arbitrator's decision more fully than any of his earlier attempts and is largely free of the 'cut and paste' style we found wanting before.

In the latest Award, Arbitrator Mitrani makes it clear that he has based his decision upon all the evidence, whether it was heard over many days of hearings or presented in hundreds of documentary exhibits. He presents what he found to be the relevant context for certain evidence which we found disturbing and how that context affected his decision.

As Central States points out, the arbitrator chose not to directly address every bit of incriminating evidence that we noted in our March 9 opinion. However, he is not required to do so: "Certainly, as finder of fact, Arbitrator Mitrani is free to give whatever weight he feels appropriate to any piece of evidence; indeed, he is free to disregard certain items entirely should he see fit." March 9 Op. at 7-8.[2] The arbitrator also explained at length why he found that Santa Fe's decision to sell SFTT was motivated primarily by reasons other than a desire to avoid withdrawal liability.

Of course, Central States disputes every interpretation made, every inference drawn and every decision rendered by Arbitrator Mitrani. They also argued that the arbitrator simply does not "get" this court's repeated instruction on the appropriate legal analysis to apply. They insist that Arbitrator Mitrani's award is a miscarriage of justice.

Certainly, a practical definition of miscarriage of justice is "we lost the case." Keith Miles, *The Finest Swordsman in all of France* (1984). Though Central States's interpretation of the record is colorable, and in many cases perhaps closer to the interpretation of this court, we are not free to substitute our judgment for that of the arbitrator. We must accept his findings of fact to the extent they are anything less than clearly erroneous.

As to Central States' argument that Arbitrator Mitrani applied the wrong legal standard, we are also unpersuaded. Though the arbitrator occasionally made an unfortunate word choice and used terms such as "bona fide" and "collusion," these isolated words do not mean that he applied the 'fraud or sham' standard we previously rejected. The overall thrust of the Award is that Santa Fe sold SFTT for several business reasons, none of which were the avoidance of withdrawal liability. Though Arbitrator Mitrani acknowledges that MPPAA liability was considered by Santa Fe, he concludes that other, unrelated reasons

---

[2] This court is not unaware of the irony presented by our use of a modicum of the 'cut and paste' style we have so disapproved of in the past.

predominated to the extent that avoidance of MPPAA liability could not be considered a "principal purpose" of the sale of SFTT.

Evidence can lead rational finders of fact to different conclusions. In the present case, Central States has pointed out meaningful evidence that supports its arguments. However, the arbitrator, who reviewed all the evidence in this case, chose to credit Santa Fe's explanations of those materials.

The law binds us to a narrow review of an arbitrator's decision under MPPAA. *See* 29 U.S.C. § 1401(c) (presumption rebuttable only by a clear preponderance of the evidence that findings of fact of arbitrator were correct). Under that standard, we have corrected the arbitrator's error of law and demanded a rational basis from the record for his findings of fact. We can do no more. Thus, we cannot find, as a matter of law, that Arbitrator Mitrani's findings of facts were clearly erroneous. *L. Zahn Drugs*, 890 F.2d at 1411 ("clear preponderance" standard functionally equivalent to "clearly erroneous" criterion).

Conclusion

Santa Fe's Second Renewed Motion for Summary Judgment to confirm the Second Supplemental Opinion and Award of April 22, 1993, is granted. Central States' Second Renewed Motion to Vacate the Award and to enter Summary Judgment in its favor is denied.

ENTER:_____
PAUL E. PLUNKETT
UNITED STATES DISTRICT JUDGE

DATED: June 17, 1993

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION
MULTIEMPLOYER PENSION PLAN
ARBITRATION RULES

IN THE MATTER OF THE ARBITRATION

BETWEEN

SANTA FE PACIFIC CORPORATION,
formerly known as SANTA FE
SOUTHERN PACIFIC CORPORATION,

Claimant,

AND

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,

Respondent.

AAA CASE NO. 51 621 0012 88V

SECOND SUPPLEMENTAL OPINION AND AWARD

ROBERT L. MITRANI
Arbitrator

(A) INTRODUCTION

The Arbitrator rendered his original award on January 1, 1992.

On December 15, 1992, he issued a supplemental opinion.

On March 9, 1993, Judge Paul E. Plunkett issued an Order again remanding this matter back to the undersigned Arbitrator.

On Tuesday, April 6, 1993, the parties and the Arbitrator had a conference telephone call and it was agreed that the Arbitrator was to issue a second supplemental award by Friday, April 30, 1993.

In his Order Judge Plunkett wrote the following:

> "Neither the law nor this court requires the arbitrator to make the 'correct' decision. We ask only two things of Arbitrator Mitrani on remand: (1) that his decision be reasonable; and (2) that it be supported by an explicit factual basis from the record. Once these requirements are satisfied, we may ask no more."

(B) DISCUSSION

The Arbitrator believes it is necessary to first review the evidence involving Santa Fe's subjective intent to evade. First of all, there were fifteen meetings in this case with an enormous amount of material presented to the Arbitrator. On any given point involved in this case, it is possible to extract excerpts from the record to present a point of view that does not reflect the full record of this case.

The Arbitrator carefully studied the two documents written by John Schmidt on June 2 and October 18, 1982 as well as the March 24, 1983 document (see page 5 of Judge Plunkett's Order). Furthermore, the Arbitrator studied the other documents related to the question of "subjective intent to evade". And the Arbitrator has once more arrived at the same conclusion that Santa Fe did not have as a "principal purpose" the sale of SFTT to evade or avoid withdrawal liability. Santa Fe studied the potential withdrawal liability so that it could have all the facts in front of them in deciding what actions to take regarding the withdrawal liability. The study of the withdrawal liability was a cost factor that had to be understood.

In his Order of March 9, 1993, Judge Plunkett included the following from a document dated March 24, 1983 by John Schmidt:

> "In view of the continued deterioration of this operation and a lack of a viable plan for making the company profitable, I believe the entire operation should be closed

> down in stages. However, before commencing the closedown, I will make an effort to locate a purchaser for the company. If a purchaser can be located, there is a good possibility of transferring part or all of a rather substantial liability which the company is incurring under the Multiemployer Pension Plan Amendments Act (MPPAA)."

The Arbitrator does not find that the above statement indicates that John Schmidt had as a "principal purpose" the evading or avoiding of withdrawal liability. The record is clear in this case that John Schmidt and his management team reviewed the pension withdrawal liability as one of numerous business factors that had to be studied. In fact, John Schmidt testified at one of the early hearings that the withdrawal liability wasn't even a factor in the decision to sell SFTT. However, it was intelligent business practice for Santa Fe to know all aspects of the liability and inform potential buyers about that liability.

The March 24, 1983 memo was written by Mr. Schmidt to Mr. Reed, Chairman of Santa Fe at the time. In that document, Schmidt wrote the following:

> "If a purchaser can be located, there is a good possibility of transferring part or all of a rather substantial liability which the company is incurring under the Multiemployer Pension Plan Amendments Act (MPPAA)."

However, not even this sentence should be taken out of context. Schmidt was only saying that SFTT could be closed or sold. If it was closed, Santa Fe would be responsible for withdrawal liability. If it was sold, the buyer would be responsible for future payments.

The record of this case is clear that Mr. John Schmidt's management team did a thorough study of the potential withdrawal liability for legal reasons as well as to understand the costs that were involved. The Arbitrator found this to be a responsible management practice and in no way related to the avoidance or evasion of withdrawal liability.

The parties are aware that in 1982 Mr. John Schmidt requested a study of the value of SFTT. Needless to say, there

was information in the final documents related to MPPAA. This is understandable since MPPAA was one of numerous cost factors that had to be studied. It would have been irresponsible for Santa Fe to ignore this factor in its over all study of SFTT.

The Arbitrator has once more read the transcripts related to the above issue. He has challenged his own earlier findings and once more has reached the conclusion that the evidence in this entire case supports Santa Fe's position that SFTT was sold for sound business reasons and not as a principle purpose to evade or avoid withdrawal liability.

The Arbitrator found nothing in the record to support the Fund's contention that Santa Fe had as a principal purpose the intent to evade or avoid withdrawal liability. The fact of studying all related factors concerning MPPAA does not constitute an intent to avoid. In this case, the documents related to this issue were only concerned with the impact of MPPAA as related to SFTT, as well as the cost and legal questions. There is no evidence that somehow there was a scheme to evade and avoid withdrawal liability.

However, the Arbitrator also has concluded that the above factor related to "Santa Fe's subjective intent to evade" cannot be studied by itself. It must be studied in the context of the entire case, especially the compelling reasons for the sale.

Without getting involved in the entire history of Santa Fe and SFTT, the record of this case indicates that when deregulation effected the entire trucking industry (about 1980) many of the services rendered by SFTT were no longer required. And, worse than that, SFTT became a hindrance to Santa Fe. Up to this point, the Arbitrator has not taken any excerpts from the transcripts. However, the following excerpt from Volume 2, Page 19 by John Schmidt is worth noting:

> "Well, I drew several conclusions, frankly. One was that SFTT just didn't fit in the organization anymore. Its historic purpose, the substituted service requirement was gone. Prior and subsequent haul requirement with respect to working with the railroad was gone. And deregulation, the railroad could and did work with and wanted to work with all kinds of consolidators. SFTT was

antagonistic to that desire because, as I explained, it was soliciting business away from them.

One thing I don't think I mentioned is SFTT was also soliciting business away from the eastern railroads. The railroads wanted to get that same business directly, and that affected our interchange and connections with the eastern railroads. So it was a very antagonistic situation and growing worse. So as I say, it just didn't fit."

Eventually, Mr. Schmidt (Santa Fe's Chairman and Chief Executive Officer) made the decision to divest SFTT. Studies were made before this decision and SFTT was not meeting the profit goals set by Santa Fe. Mr. Schmidt decided to sell SFTT because it would save jobs and, with a different management, had an excellent chance of surviving. Especially since SFTT would not be burdened by the financial and other restraints imposed by Santa Fe.

Once deregulation went into effect, it changed the relationship between Santa Fe and SFTT. The subsidiary was no longer needed as part of Santa Fe and, as stated by Mr. John Schmidt, the Santa Fe/SFTT relationship became antagonistic. Obviously, not a good situation. The decision to sell SFTT was an intelligent business decision at the time and there was no intent to evade or avoid withdrawal liability.

In his prior awards, the Arbitrator used the word "synergy" in relating to the above issue. Obviously, there was no "synergy" between Santa Fe and SFTT. Deregulation had changed the trucking world and it certainly changed the relationship of Santa Fe and SFTT. As stated in the above quote by John Schmidt regarding SFTT, "Its historic purpose, the substituted service requirement was gone." The evidence is clear that other trucking companies were now available to provide the extension of rail service as required.

This case should not be examined in segments but should be examined as a whole. The Arbitrator has found that the decision to sell SFTT was dictated by the realities that were created by deregulation. In effect, Santa Fe and SFTT became antagonists. It made sense to sell SFTT. And, at the same time, that the decision making process was taking place, Santa Fe was

studying every aspect of SFTT, including the MPPAA liability described in the first section of this award.

However, in once more restudying this entire case, the Arbitrator once more reviewed whether SFTT was a viable company. And, as stated in his prior awards, the Arbitrator was once more impressed by the testimony of witnesses who were previously employed by SFTT.

Mr. McKee was SFTT's financial officer. McKee got 30 SFTT employees to join him in an attempt to buy SFTT from Santa Fe. Would these employees (including major members of SFTT's top management) have risked their savings if they thought SFTT was doomed to failure? Obviously not. The McKee group had good plans for SFTT because they knew what had to be done. And breaking away from Santa Fe would have helped SFTT in its over-all operations including labor negotiations. Mr. McKee would have been free to pursue meaningful programs with the full cooperation of all the employees. Although the Arbitrator is reluctant to now engage in "cut and paste" style, he believes it is worth noting the following paragraph from his first award dated January 1, 1992.

> "However, the Arbitrator was most impressed by the testimony of those witnesses who were previously employees of SFTT. These employees wanted to purchase SFTT. If anyone knew of all the intricate details of operating SFTT on a short-term as well as long term basis—it was these employees and there is nothing in the record that they wanted to commit financial suicide. SFTT was viable as far as they were concerned and the Arbitrator agrees with them. There was a question if Santa Fe "propped up" SFTT in order to avoid MPPAA liabilities and that Santa Fe knew that SFTT had to fail. But, once more, the Arbitrator carefully reviewed the testimony of Mr. McKee. He knew that SFTT was a viable company and in fact was looking forward to operating SFTT away from the influences of Santa Fe. McKee was aware that SFTT's affiliation

with Santa Fe did more harm than good in many fundamental areas of the business."

The findings in the above paragraph are as valid today as they were on January 1, 1992. Mr. McKee knew that SFTT's financial condition was good. McKee wanted to purchase SFTT so that it could continue to operate in a profitable manner and even be a more efficient company.

But the company was not sold to the McKee Group. It was sold to RSI. Was the sale of SFTT to RSI a bona fide and arms length transaction? The Arbitrator's finding is that it was. First of all, Mr. Leonard J. Lewenson, who was first a consultant and then President of RSI, was a credible witness. He knew all of the details concerning MPPAA and he also knew that SFTT was a sound company. He recommended the purchase. Mr. Lewenson described in detail the RSI business plan to sell assets that were not needed and to operate SFTT as a profitable trucking company. Of course, the parties are aware that this business plan was presented to Interfinancial Corporation and they made $5 million in acquisition financing available to RSI.

The Arbitrator agrees with the statements made by Mr. John Schmidt on this aspect of the case. SFTT would be better off when certain obstacles were eliminated from SFTT's operations.

The Arbitrator was also impressed with the testimony given by Joe Hinkel of Arthur Anderson Co. He stated that there were many opportunities for SFTT to cut costs and that there were assets to keep them going for years. Hinkel stated that the $2.6 million purchase price debt was not out of line considering that SFTT had assets of about $20 million.

The evidence in this case makes it quite clear that Santa Fe did not believe that withdrawal liability would arise after the sale and the sale was not made for the purposes of evading or avoiding withdrawal liability. However, did some form of conspiracy exist between Santa Fe and RSI that made the sale something less than bona fide? Once more the Arbitrator challenged his original findings on this matter. The Arbitrator could find no credible evidence that could indicate any form of collusion between Santa Fe and RSI. The parties operated at arms length and there is no

question that RSI wanted to buy SFTT because they believed it was a good purchase, just as the employees of SFTT (McKee Group) thought it was a good purchase. Santa Fe's subjective intent in selling SFTT was not to evade or avoid withdrawal liability. There were questions raised about RSI's financing to purchase SFTT. This was handled by RSI itself and not SFTT. The fact that RSI wanted an LBO was its own business. This does not indicate that Santa Fe had as a principal purpose the goal of evading or avoiding withdrawal liability. And, as Mr. Hinkel testified, SFTT was not highly leveraged.

What then happened after the sale to cause the failure of SFTT? Previously, the Arbitrator found that less than two months after the purchase of SFTT, RSI purchased the BN Companies. This was not part of RSI's original business plan and it was a serious blunder from a financial and operational point of view. Mr. McKee's testimony, regarding all the problems that occurred thereafter, gives a good deal of insight into the problems that existed. There was a good deal of confusion and problems. The Arbitrator found Mr. McKee to be a credible witness and he gave detailed testimony about computer problems and the fact that SFTT and BN didn't get along. There were many problems. Then IBT Local 710 began a strike on December 3, 1984 at SFTT's Chicago terminal. The strike was brought on by the merger of BN. SFTT was hurt badly by the strike.

Before the sale, no one could predict the purchase of the BN Companies or the Teamster strike that began in December 1984. These were the main reasons that SFTT failed. And the interesting thing is that the management of RSI had many years of successful experience before the purchase. There was no reason before the sale to believe that there would be a failure after the sale, resulting in a potential withdrawal liability to the Fund. One of the points raised by the Fund was that SFTT lost revenue from its cartage contracts with Santa Fe. But the record indicates that all the cartage work continued through 1984. The only location where SFTT lost cartage work was in Richmond, California. However, SFTT continued to work with Santa Fe in its other locations. This factor had nothing to do with SFTT's failure.

One of the points raised by Central States is why Santa Fe decided to sell SFTT rather than liquidate it. Central States raises the point that the sale was made to avoid withdrawal liability. But the Arbitrator found that the testimony of John Schmidt was credible. If SFTT was closed, there would have been a serious loss of jobs. Furthermore, selling of assets causes numerous problems that can go on for some time. By selling SFTT, the employees in question would continue to have jobs. And it was Mr. Schmidt's experience that stock sales, that were done with other subsidiaries, could get a higher price for the sale.

When the Arbitrator once more examines the situation that existed in early 1984, he finds that Santa Fe could have sold to the McKee group or sold to RSI or closed down SFTT. The RSI offer was worth somewhat over $4 million. If the operation was shut down, and with Santa Fe paying the withdrawal liability Santa Fe would still have made a profit of over $3.5 million. But, from a financial perspective, the RSI offer was better and, from a human point of view, all the jobs would have been saved rather than eliminated. The Arbitrator finds the record to be clear that Santa Fe did not have as "a principal purpose" the sale of SFTT to evade or avoid withdrawal liability.

Obviously, SFTT faltered shortly after the sale. But was this in any way the fault of Santa Fe? The Arbitrator has concluded that it was not. Central States believes that Santa Fe used the sale to avoid liability. Santa Fe took a risk and it lost, according to Central States, and now it must pay. However, throughout this entire case, the Arbitrator found that Santa Fe did not have as "a principal purpose" the sale of SFTT to evade or avoid withdrawal liability. The Arbitrator has discussed the major points in the prior sections of this award. The Arbitrator may not have repeated every point made by the parties but he has reviewed the major points. The Arbitrator has found that there is a consistency throughout this long case that Santa Fe did not have, as a principal purpose, the desire to avoid or evade withdrawal liability and the reasons are stated earlier in this award. This is a case that must be evaluated as a whole rather than with bits and pieces here and there. The Arbitrator has attempted to do this in this award and to do it in the manner suggested by Judge Plunkett.

AWARD

Santa Fe did not have as "a principal purpose" the evasion or avoidance of withdrawal liability when it sold SFTT. The Arbitrator once more is awarding in favor of Santa Fe on all issues presented.

ROBERT L. MITRANI, Arbitrator
April 22, 1993

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**SANTA FE PACIFIC CORPORATION,
formerly known as SANTA FE
SOUTHERN PACIFIC CORPORATION**

Plaintiff,

v.

**THE CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS PENSION
FUND,**

Defendant.

No. 92 C 0677

Hon. Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

This matter is before us upon the parties' Renewed Cross Motions for Summary Judgment. For the reasons set forth below, Santa Fe's Motion for Summary Judgment to confirm the arbitration Award of December 15, 1992, is denied in its entirety. Central State's Motion for Summary Judgment to Vacate the Award and enter judgment in its favor is granted in part and denied in part.

Background

This case involves pension fund withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). 29 U.S.C. § 1381 (1985). MPPAA was enacted by Congress to correct the problem created when employers with vested pension obligations cease to make payments to a pension

fund. *Robbins v. Lady Baltimore Foods, Inc.*, 868 F.2d 258, 261 (7th Cir. 1989). The MPPAA provides that an employer who withdraws from a covered plan incurs withdrawal liability sufficient to cover its employees' vested but unfunded benefits. 29 U.S.C. § 1381(l), 1382. When it is determined that an employer has withdrawn from the plan within the meaning of sections 1383 and 1385, the plan sponsor must: (1) determine the amount of withdrawal liability; (2) issue a notice of withdrawal; (3) calculate a schedule of payments; and (4) collect the amount of liability from the employer. 29 U.S.C. §§ 1382, 1399 (b)(1) (1985).

The MPPAA provides that "[a]ny dispute between an employer and the sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration." 29 U.S.C. § 1401(1) (1985). In the present case, the facts of which we adequately discussed in prior opinions, Central States notified Santa Fe of the determination that it was liable for pension fund withdrawal. Santa Fe made a timely demand for arbitration. After extended evidentiary proceedings, on January 1, 1992, Arbitrator Robert Mitrani issued a fifty-two page award, finding in favor of Santa Fe on all issues.

The MPPAA provides that any party to the arbitration proceedings may bring an action in federal court within thirty days of the issuance of the arbitrator's award. *See* 29 U.S.C. §§ 1401(b)(2), 1451 (1985). Upon review of the January 1 Award in this Court, we approved the findings of the Arbitrator as to several issues. However, we determined that it was unclear whether the Arbitrator had applied the correct legal standard in finding that Santa Fe's sale of SFTT did not result in withdrawal liability under MPPAA. Thus, we remanded the case to the Arbitrator to determine whether Santa Fe had, as a "principal purpose," the intent to evade or avoid pension fund liability when it sold SFTT. 29 U.S.C. § 1392(c) (1985).

A principal shortcoming of Arbitrator Mitrani's first award was that it consisted mainly of quotes from the parties' briefs and contained almost no independent analysis by the Arbitrator. In our August 20, 1992 Opinion, we specifically instructed Arbitrator Mitrani to articulate his reasoning clearly enough to allow us, as the reviewing court, to analyze the steps by which he arrived at his

factual conclusions. *Santa Fe v. Central States*, No. 92 C 0677, slip. op. at 4-5 (N.D. Ill. Aug. 20, 1992) (Plunkett, J.). *See also* 29 C.F.R. § 2641.7 (1992) (guidelines for arbitration under MPPAA state that "[t]he arbitrator shall render a written award that (1) States the basis for the award, including such findings of fact and conclusions of law . . . as are necessary to resolve the dispute.")

Following our remand, Arbitrator Mitrani issued a second Award on December 15, 1992. In the December Award, the Arbitrator again held in favor of Santa Fe, stating

> [t]he Arbitrator found once more that sound business reasons were the motivating factors and Santa Fe did not have as a principal purpose the evasion or avoidance of withdrawal liability. There were sound business reasons to sell SFTT. These reasons are complex and were covered in the Arbitrator's first award. SFTT was sold for good and legitimate business reasons. . . . This had nothing to do with evading or avoiding withdrawal liability.

December 15, 1992 Award at 6-7. The parties filed their Renewed Motions for Summary Judgment with this Court shortly after the Award was issued.

Discussion

In reviewing the factual findings of an arbitrator under the MPPAA, we apply the standard of review provided by Congress: "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c). The "clear preponderance" standard has been interpreted by the Seventh Circuit as functionally equivalent to the more familiar "clearly erroneous" criterion. *Chicago Truck Drivers Pension Fund v. L. Zahn Drugs*, 890 F.2d 1405, 1411 (7th Cir. 1989).

Thus, we treat Arbitrator Mitrani's findings of fact with substantial deference. Under the clearly erroneous standard, we are not free to disturb the holding below merely because we have doubts about its wisdom or think we may have reached a different

result. Rather, "[t]o be clearly erroneous, a decision must strike us as more than just maybe wrong; it must . . . strike us as wrong with the force of a five-week-old unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988), *cert. denied*, 493 U.S. 847 (1989).

I. The Evidence of Santa Fe's Subjective Intent to Evade

Several internal Santa Fe documents make it clear that withdrawal liability involving SFTT was very much in the mind of Santa Fe management during the years prior to the sale. Indeed, these documents seem to indicate that though liquidating SFTT made the most sense from a purely business standpoint, only a sale such as the one that did occur would have allowed Santa Fe to avoid pension fund withdrawal liability. The obvious implication is that Santa Fe chose to sell rather than close the subsidiary in order to transfer MPPAA liability to the buyer.

Two Santa Fe documents written by John Schmidt, labeled "Personal and Confidential" and dated June 2 and October 18, 1982, clearly show that Santa Fe knew that MPPAA withdrawal liability for SFTT was a near certainty and discuss proposals to minimize that liability. (*See* Fund Exs. 55, 77.) Yet a third document by Schmidt, dated March 24, 1983 is even more telling:

> In view of the continued deterioration of this operation and a lack of a viable plan for making the company profitable, I believe the entire operation should be closed down in stages. However, before commencing the closedown, I will make an effort to locate a purchaser for the company. **If a purchaser can be located, there is a good possibility of transferring part or all of a rather substantial liability which the company is incurring under the Multiemployer Pension Plan Amendments Act (MPPAA).**

(Fund Ex. 93) (emphasis added).

Other documents also indicate that avoiding withdrawal liability was a primary concern in Santa Fe's decision making concerning SFTT. These include the notes of Santa Fe general

counsel David Hicks concerning impending withdrawal liability unless SFTT is sold[1] and an internal memo from Mr. Hicks discussing an offer to purchase SFTT. ("MPPA liabilities could be avoided in the sale to the Group.") (Fund Ex. 120.)[2] Yet another memo from Hicks comments on Santa Fe's rejection of an attempt by SFTT management to purchase SFTT: "Due to MPPA considerations among other things, you advised him that we were seeking a large, financially strong purchaser." (Fund Ex. 111.)

We recognize that these documents present only the barest sketch of the full factual record. Indeed, we agree with Santa Fe's argument that its subjective intent in selling SFTT cannot be decided with references to these isolated documents alone. Rather, it can be decided only with reference to the entire factual record, including testimony of the Santa Fe decision makers at the time of the sale. (*See* Reply Br. at 9.)

While Arbitrator Mitrani has made the results of his deliberation clear enough, he has given us no indication of the

---

[1] The notes state "MPPAA/Multiemployer Pension Plan Amendments Act under current law—if liquidated, would have an estimated withdrawal liability of $9 million in 1986, if sell stock or assets (section 4204) liability will be assumed by buyer who will take over SFTT's contribution history to funds. . . . For our protection buyer must continue in business for a number of years, however. Otherwise, we could be subject to the withdrawal liability on the theory that our sale was fraudulent and an attempt to evade MPPAA." (Santa Fe Ex. 53.)

[2] That internal memo also shows that a proposed sale of SFTT would bring in approximately the same amount as a liquidation of its assets unless withdrawal liability was fully considered as part of the cost of a liquidation. Considering withdrawal liability, the potential sale would have brought $7.2 million while a liquidation would have only brought in $5.8 million. (Fund Ex. 120.) This tends to support Central State's argument that though it was logical for Santa Fe to dispose of a losing business, a "principal purpose" of choosing a leveraged buyout instead of a liquidation was to avoid withdrawal liability.

process he employed to arrive there. Apparently, there was sufficient contrary evidence to persuade Arbitrator Mitrani to disregard these documents and find that avoidance of MPPAA liability was not a principal purpose of the sale of SFTT. However, we simply have no idea what that evidence might be beyond the Arbitrator's remarks about "many compelling business reasons" to sell SFTT other than MPPAA liability and a cryptic reference to a lack of "synergy" between Santa Fe and SFTT. (*See* December 15 Award at 5; January 1, 1992 Award at 43-44.) We simply cannot say why he disregarded the above documents or found them less credible than other, unnamed evidence.

Further, section 1392(c) states that avoidance of withdrawal liability may not be a principal purpose of any transaction. 29 U.S.C. § 1392(c). The obvious implication is that while there may be multiple primary reasons for any transaction scrutinized under the MPPAA, avoidance of withdrawal liability may not be found anywhere among them. Arbitrator Mitrani's finding that there were "many compelling business reasons" to sell SFTT, though perhaps well founded, simply does not address this problem: the existence of other, legitimate principal purposes for the sale of SFTT does not preclude intent to avoid MPPAA liability from being yet another principal purpose of the buyout.

Certainly, as finder of fact, Arbitrator Mitrani is free to give whatever weight he feels appropriate to any piece of evidence; indeed, he is free to disregard certain items entirely should he see fit. In this case however, we can only speculate as to what evidence the Arbitrator found to persuasively establish that MPPAA liability was not a "principal purpose" of the sale of SFTT. However, few or none of these facts are discussed or even cited by Arbitrator Mitrani in either of his Awards.[3] In fact, of

---

[3] Santa Fe has been kind enough, in an earlier brief, to provide us with a seven-page summary of the factual basis for the Award, including references to testimony by Santa Fe executives. (*See* Mem. in Supp. of Mot. for Summ. J. to Confirm Arbitrator's Award, May 21, 1992 at 7-14.) We are uncomfortable accepting the purported factual basis for the Arbitrator's award from one of

(continued...)

the various inculpatory documents cited above, none are specifically discussed in the December 15 Award.

II. Summary

We are again unable to glean enough information from Arbitrator Mitrani's Award to make a principled decision on its merits: we cannot determine if the decision to absolve Santa Fe of withdrawal liability was clearly erroneous without some knowledge as to its basis. Our brief review of the evidence has revealed several disturbing anomalies in the record which the Award has not addressed or explained. Although we do not necessarily doubt that sufficient evidence was presented by Santa Fe to rebut the documents cited above, we have been made aware of none of it.

Reluctantly, we must return this matter yet again to the Arbitrator. Even if the reek of "five-week-old unrefrigerated dead fish" is not present, *Sterling Electric, Inc.*, 866 F.2d at 233, there is a definite and unpleasant effluvium that wafts about the December 15 Award. Though Arbitrator Mitrani certainly makes it clear enough that he found that Santa Fe did not have avoidance of MPPAA withdrawal liability as a "principal purpose" behind the sale of SFTT, *see, e.g.*, December 15 Award at 6-7, 9-10, he did so despite considerable evidence, pointed out by Central States in arguments that may have merit, to the contrary.

---

[3](...continued)
the parties where the Arbitrator has declined to provide it. Further, the facts provided shed little light on what legitimate business reasons, other than avoiding MPPAA liability, led to the leveraged buyout of SFTT. Arbitrator Mitrani dwelled on the fact that the buyers of SFTT saw the company as a viable enterprise that they could operate profitably for years to come. We doubt one would buy a business about which he felt otherwise. However, the evidence makes it clear that Santa Fe knew that unless the buyer operated SFTT for several years, Santa Fe would be exposed to liability. Thus, Santa Fe's search for a viable buyer only strengthens the inference that a principal purpose of the sale was to avoid withdrawal liability.

Of course, the mere fact that we disagree with the Arbitrator's decision is not sufficient grounds to vacate it. We recognize that he is in a unique position to view each document in light of all the evidence and to observe the demeanor of the witnesses called to testify. We also realize that we are bound by law to give deference to his decisions. However, we need not simply accept a decision that flies in the face of the portions of the evidence we have seen upon blind faith alone.

Neither the law nor this court requires the arbitrator to make the "correct" decision. We ask only two things of Arbitrator Mitrani on remand: (1) that his decision be reasonable; and (2) that it be supported by an explicit factual basis from the record. Once these requirements are satisfied, we may ask no more.

Conclusion

For the reasons stated above, we vacate the Arbitrator's Award of December 15, 1992 and remand it to the Arbitrator for clarification for the second time. Santa Fe's Motion for Summary Judgment Confirming the Award is denied in its entirety. Central State's Motion for Summary Judgment Vacated the Award is granted; its motion to enter judgment in its favor is denied. This time, Arbitrator Mitrani is to provide us with an award that contains cogent, independent analysis (largely free, we hope, of his previous 'cut and paste' style) that carefully addresses our concerns about the evidence in this case. The award should clearly detail the Arbitrator's own findings of fact, the rationale behind them and the evidence upon which they are founded.

ENTER: _____
PAUL E. PLUNKETT
UNITED STATES DISTRICT JUDGE

DATED: March 9, 1993

APPENDIX E

AMERICAN ARBITRATION ASSOCIATION
MULTIEMPLOYER PENSION PLAN
ARBITRATION RULES

IN THE MATTER OF THE ARBITRATION

BETWEEN

SANTA FE PACIFIC CORPORATION,
formerly known as SANTA FE
SOUTHERN PACIFIC CORPORATION

Claimant,

AND

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,

Respondent.

AAA CASE NO. 51 621 0012 88V

OPINION AND AWARD

ROBERT L. MITRANI
Arbitrator

(A) INTRODUCTION

The Arbitrator rendered his original award on January 1, 1992.

The following are excerpts from the parties' briefs (both received on December 1, 1992) regarding the matter involved in this award.

Santa Fe

"In his August 20, 1992 Memorandum Opinion and Order ("Aug. 20th Opinion"), Judge Plunkett found that "[b]both parties advocated before the arbitrator standards under §1392(c) that we find are incorrect as a matter of law, and we are not certain that the arbitrator applied the correct standards." (Aug. 20th Opinion, p. 1). As a result, Judge Plunkett "remanded this case to the arbitrator for clarification of the standard he applied under 29 U.S.C. §1392(c)." (October 6th Opinion. p. 1, hereinafter "Oct. 6th Opinion" (emphasis added)). All other issues, including the contentions raised by Central States under Section 1398, were decided by Judge Plunkett. It is important to note that Judge Plunkett did not direct the Arbitrator to reconsider any of his factual findings. On remand, the Arbitrator may limit himself to clarifying the standard he applied, and then applying that standard to the factual findings he has already made.

In order to assist the Arbitrator in that task, Judge Plunkett set forth the legal standard to be applied under Section 1392(c):

> whether or not Santa Fe had as "a principal purpose" the evasion or avoidance of withdrawal liability when it sold SFTT.

(Aug. 20th Opinion. p.5 (emphasis in original)). Judge Plunkett ruled that Section 1392(c) does not impose a literal "sham or fraud" standard; nor does it require that evasion or avoidance of withdrawal liability be "the principal purpose" for the transaction. (Aug. 20th Opinion, p. 3-4). Instead, Judge Plunkett found that, under the plain language of section 1392(c), the transaction at issue should be disregarded if evasion or avoidance of withdrawal liability is "a principal purpose" of the transaction (Id.). Judge Plunkett went on to define that standard further: "The plain language of §1392(c) requires that evasion or avoidance must be one of the significant or central factors." (Aug. 20th Opinion, p.4). Since "a principal purpose" is the language of the statute,

the Arbitrator should interpret Judge Plunkett's use of the words "one of the significant or central factors" as having the same meaning as "a principal purpose."

"Judge Plunkett has "vacated" the Arbitrator's Opinion and Award, meaning that the final ruling in favor of Santa Fe is no longer enforceable; but he did not reject, or direct the Arbitrator to disregard, the entirety of that opinion. That opinion remains an important part of the legal record in this case and, indeed, major portions of that opinion were effectively affirmed. For example, all of the Section 1398 arguments were resolved against Central States in the Arbitrator[s initial decision, and those findings were accepted and affirmed by Judge Plunkett and have not been remanded. Thus, the Arbitrator's supplemental opinion should not attempt to readdress every issue raise din the arbitration, and indeed should only address one issue: whether Santa Fe had as "a principal purpose" the evasion or avoidance of withdrawal liability when it sold SFTT."

CENTRAL STATES

"On the prior round of this arbitration Santa Fe Pacific Corporation ("Santa Fe") built its case around two concepts:

1) the standard under the withdrawal liability "evade or avoid" statute [29 U.S.C. §1392(c)] is a "sham or fraud" test; and

2) although Santa Fe Trails Transportation Company ("SFTT") was burdened with excessive costs and suffered large losses as a subsidiary of Santa Fe, SFTT had viability as a separate, stand-alone company.

The Arbitrator's January 1, 1992 Opinion adopted both of these central pillars of Santa Fe's argument. However, under the district court's rulings dated August 20 and October 6, 1992, the first of those pillars must surely fall: Judge Plunkett has made abundantly

clear that 29 U.S.C. §1392(c) does *not* create a sham or fraud standard; rather, the question is whether "a principal purpose" (emphasis added) of the July 1984 sale of SFTT's stock was the avoidance of withdrawal liability.

Furthermore, the second pillar of Santa Fe's argument has become irrelevant. The undisputed evidence shows that for years prior to the July 1984 sale Santa Fe recognized that at least while SFTT remained part of the Santa Fe conglomerate, SFTT would remain weak and in danger of triggering withdrawal liability. During the prior round of this arbitration, Santa Fe tried to make the most of these circumstances; Santa Fe argued that it sold SFTT with the "good faith" expectation that the sale would make SFTT more successful by getting that company away from Santa Fe's influences. But in light of Judge Plunkett's October 6th ruling, it will do Santa Fe no good to claim that the Santa Fe conglomerate lacked synergy with SFTT, and was the cause of SFTT's pre-sale problems."

"Santa Fe has stated that the task now before the Arbitrator consists of preparing a "clarifying order. Of course, Judge Plunkett certainly indicated that clarification of the Arbitrator's prior opinion is in order. However, this is not—as Santa Fee cynically implies—simply a question of "clarifying" why is it Santa Fe must still win this case, despite Judge Plunkett's rejection of Santa Fe's key legal argument. Judge Plunkett's rulings mandate a rethinking of this case from top to bottom. When the legal standards articulated by Judge Plunkett are applied to the facts of this case, the result is a different conclusion—not just a different explanation for the same conclusion which the Arbitrator previously expressed."

(B) DISCUSSION

It is quite clear that the parties have a difference of opinion as to Judge Plunkett's August 20, 1992 Memorandum Opinion and Order.

In order to be thoroughly prepared, the Arbitrator once more reviewed the record developed during the fifteen hearings prior to the Arbitrator's award on January 1, 1992.

The Arbitrator also reviewed his award against the parties' briefs dated November 30, 1992 (and received by the Arbitrator on 12/1/92).

In its brief, Central States stated the following:

> "In a report to Santa Fe in September and November 1981, the consulting firm of A.T. Kearney concluded that SFTT "is not viable as a trucking company in its present form," and that "status quo operation with existing or new management is not viable."

However, the Arbitrator carefully studied this issue and found that SFTT was a viable company and many individuals with detailed knowledge of SFTT wanted to purchase the company because it was viable.

Also, in its brief, Central States stated the following:

> "The October 1983 deadline came, but SFI had no offer from any buyer meeting its "financial strength" criterion. (Tr. Vol. 9 (2/28/91), pp. 66-67.) However, three unsolicited leveraged buyout offers for SFTT's stock did emerge—two from SFTT employees (Larry McKee and David Kelley), and one from a concern known as Rail Service, Inc. ("RSI")."

The Arbitrator once more spent a good deal of time on this aspect of the case and found no improprieties with these LBO's. Certainly, there were no indications that Santa Fe had as a principal purpose the evasion or avoidance of withdrawal liability. Certain individuals wanted to purchase a viable company and they decided on a method of finance. Certainly, Larry McKee was not a naive novice in this matter.

The Arbitrator also finds that the sale to RSI had nothing to do with the evasion or avoidance of withdrawal liability (as a principal purpose or otherwise). The record indicates this was a sound business decision. Once more, the Arbitrator finds that after the sale, RSI made some bad management decisions which were not known to Santa Fe before the sale.

The full history of this case clearly indicates to the Arbitrator that the sale of SFTT did not have as a principle purpose the evasion or avoidance of withdrawal liability.

The Arbitrator realizes that in his January 1, 1992 award, he used the term "sham". In its brief Central States wrote the following:

> "Therefore, the Judge ruled that the Arbitrator must determine whether one of the principal purposes of the July 1984 LBO/stock sale was the avoidance of withdrawal liability."
>
> "In light of the rejection of these legal standards by Judge Plunkett, a complete review of the record is required. As argued below, under the correct "a principal purpose" standard, an award must not be entered in favor of the Pension Fund."

Central States also made the following point:

> "One of Santa Fe's principal purposes in entering the July 1984 LBO/stock sale was the avoidance of withdrawal liability. Santa Fe chose the LBO/stock sale as the transaction to dispose of SFTT precisely because that transaction could be entered without triggering withdrawal liability."

The Arbitrator rejects this point. There were many compelling business reasons why Santa Fe wanted to sell SFTT. These reasons were covered in the Arbitrator's first award. The pension costs were one of the factors that was studied. But there were far more important reasons for the sale and they had nothing to do with the principal purpose of evasion or avoidance of withdrawal liability. In its brief, Central States wrote the following:

> "Under Judge Plunkett's rulings, this case is not about whether Santa Fe was a "bad guy"; notions of "fraud," "sham," "conspiracy," and "sinister plot" form no part of the legal standard to be applied here. Even if Santa Fe's intentions were otherwise good and honorable, if but one of Santa Fe's principal purposes in the stock

sale transaction was the avoidance of withdrawal liability, that transaction must be unwound."

Did Santa Fe in any aspect of this case have as a principal purpose the evasion or avoidance of withdrawal liability. The Arbitrator thinks not.

In his study for this award, the Arbitrator studied each phase from beginning to the end, as recorded in the record of this case. Each phase had numerous factors. These factors were quite complex. The Arbitrator is aware that pension costs were a business factor that were studied. But the Arbitrator specifically analyzed each phase and factor to determine if there was any evidence if Santa Fe had as a principal purpose the evasion or avoidance of withdrawal liability when Santa Fe sold SFTT. The Arbitrator found no evidence. Central States argues that "Santa Fe chose the LBO/stock sale as the transaction to dispose of SFTT precisely because that transaction could be entered without triggering withdrawal liability." The Arbitrator disagrees with that conclusion. SFTT was a viable company and there was no reason to anticipate that RSI couldn't operate it for a long time.

In its brief Santa Fe wrote the following:

"The Arbitrator made numerous factual findings in his initial Opinion and Award in this case. In particular, the Arbitrator made four overall findings of fact that pertain directly to the sole remaining issue of whether Santa Fe had as a principal purpose the evasion or avoidance of withdrawal liability when it sold SFTT:

* Santa Fe sold SFTT for numerous legitimate business reasons unrelated to potential MPPAA withdrawal liability.

* Although Santa Fe had considered MPPAA regulations and obligations, those considerations were not a "special concern," but were treated the same as all other potential costs associated with the transaction.

* Based on the testimony of the prospective purchasers of SFTT and the expert

witnesses retained by both parties, the Arbitrator found that SFTT was viable at the time of the sale.

* SFTT's failure was caused by factors that occurred after the sale—RSI's purchase of the BN companies and a labor strike—which were not foreseeable by Santa Fe at the time of the sale.

Judge Plunkett did not direct the Arbitrator to reassess those factual findings in either of his Opinions, nor did he find any fault with those findings. Applying the legal standard articulated by Judge Plunkett to those already determined facts, it is reasonable to conclude that Santa Fe did not subjectively intend evasion or avoidance of withdrawal liability to be "a principal purpose" of the SFTT sale."

However, the Arbitrator once more analyzed the four points made above from the standard of "a principle purpose" rather than from the point of view of a "sham." The Arbitrator found once more that sound business reasons were the motivating factors and Santa Fe did not have as a principle purpose the evasion or avoidance of withdrawal liability. There were sound business reasons to sell SFTT. These reasons are complex and were covered in the Arbitrator's first award. SFTT was sold for good and legitimate business reasons and not to evade or avoid withdrawal liability.

In its brief, Central States stated the following:

"In the prior round of this arbitration, Santa Fe argued that the July 1984 LBO/stock sale was entered in "good faith" because Santa Fe believed that SFTT would have a better chance at survival if it were a "stand-alone" company.

The Arbitrator's Opinion adopted Santa Fe's contention on these matters. Thus the Arbitrator wrote of the advantages of "operating SFTT away from the influences of Santa Fe," and noted that "Santa Fe did more harm than good in many fundamental areas of the

business." (Arb. Op., p. 45.) Similarly, the Arbitrator found that the sale of SFFT was entered for "various reasons related to synergy" (Arb. Op., p. 44): that is, the Arbitrator decided that Santa Fe and SFTT were at "cross-purposes" and lacked "strategic fit" (Arb. Op., p. 43).

These findings show that from Santa Fe's standpoint—which must form the true focus of the evade or avoid test—SFTT was not viable as a member of the Santa Fe organization and was bound to trigger withdrawal liability unless it was sold to some entity that could made a better "fit" with it."

The Arbitrator disagrees with the conclusion reached by Central States. The motive to sell SFTT was based on the fact that both Santa Fe and SFTT would be better off if they parted company. This had nothing to do with evading or avoiding withdrawal liability. The relationship of SFTT within Santa Fe left a lot to be desired. The executives within SFTT knew this and they knew that SFTT could do very well away from Santa Fe.

In its conclusion, Central States included the following:

"This case did not concern whether Santa Fe has committed some morally or legally blameworthy act. Santa Fe, like every other parent corporation in this country, was and is free to sell the stock of its subsidiaries. The withdrawal liability statute expressly provides that a "change in corporate structure" will not in itself result in imposing withdrawal liability, and the Pension Fund has not attempted to do so in this case. 29 U.S.C. § 1398.

However, the uncontradicted evidence shows that Santa Fe chose the stock sale method of disposal precisely because that method offered the possibility of avoiding "the very probable day" of withdrawal liability. (Fund Ex. 77, p. 63.) That was a perfectly logical and rational decision for Santa Fe to make. Certainly the Arbitrator need not find that Santa Fe acted in a way that was fraudulent, sinister or conspiratorial. In fact, the Arbitrator may even decide to credit the testimony of the Santa Fe witnesses who testified that they believed that SFTT had viability as a "stand-alone" company, and that if the burdens of association

with the Santa Fe conglomerate were removed, SFTT would prosper.

But the fact is that SFTT did not prosper. The very thing that Santa Fe feared would happen while SFTT was associated with Santa Fe occurred despite SFTT's sale to another entity, and just five months after the sale. This may well have been contrary to Santa Fe's hopes and expectations. However, the fact that Santa Fe intended to use the sale to avoid withdrawal liability remains beyond dispute. The sale was simply a risk—however prudent and well calculated that risk may have been—which Santa Fe took. Santa Fe's gamble failed. Now the question is, "Who must pay?"

Withdrawal liability was created by Congress in order to cover shortfalls in pension funding, and thereby to protect the rights of employees who have been promised a pension. In achieving this goal Congress placed certain burdens squarely upon the employers. One of these burdens was the unwinding of transactions which employers enter into in order to avoid withdrawal liability. 29 U.S.C. §1392(c). That "evade or avoid" statute is Congress' answer to the question of how to allocate the cost of Santa Fe's failed gamble. Santa Fe must bear the consequences of its own decision; the consequences cannot be shifted to the Pension Fund and to the employees who are expecting a pension."

At the end of its brief, Santa Fe stated the following:

"As Santa Fe pointed out in its Post-Hearing Reply Brief, Central States' theory throughout the arbitration hearing was that Santa Fe had engaged in a scheme to evade or avoid withdrawal liability. (Santa Fe Post-Hearing Reply Brief, p. 8). That alleged scheme was based on five key factual contentions:

(1) Santa Fe knew that SFTT was doomed as an enterprise;

(2) Santa Fe nevertheless propped up SFTT in order to avoid MPPAA liabilities;

(3) Santa Fe then sold SFTT in a manner that was designed to avoid MPPAA liabilities;

(4) SFTT failed after the sale because Santa Fe removed it artificial support for SFTT; AND

(5) Throughout this activity, Santa Fe was motivated by a desire to avoid an impending withdrawal liability.

In his initial opinion, the Arbitrator rejected every one of those factual contentions."

"Accordingly, the Arbitrator has rejected the entire factual basis for Central States' theory of this case. As related above, each and every one of the Arbitrator's findings are overwhelmingly supported by the factual record.

Santa Fe has noted previously that Judge Plunkett has not directed the Arbitrator to reconsider any of his factual determinations. Instead, Judge Plunkett has directed the Arbitrator to analyze his factual findings in light of the legal standard under Section 1392(c) articulated by Judge Plunkett to determine whether "a principal purpose" of the sale of SFTT was evasion or avoidance of withdrawal liability. It is predictable that Central States will take this opportunity to argue that the Arbitrator must now make new factual findings under the mistaken assumption that a consideration of the evidence under the correct legal standard must somehow lead to different factual findings. That argument is a smokescreen. A remand for clarification and application of the standard articulated by Judge Plunkett does not at all suggest that any factual findings should be changed."

The Arbitrator has in fact reconsidered every phase of this case from the standard of "a principal purpose". The business decisions involved in this case were multi-faceted and quite varied. It is possible that numerous interpretations could be placed on each phase of this case given the enormity of the testimony and documents that are involved. But the Arbitrator has evaluated every phase of this case with a close eye on the standard of "a principal purpose." It is the Arbitrator's finding that throughout the long history of this case Santa Fe did not have as a principal purpose the evasion or avoidance of withdrawal liability. Santa Fe wanted to sell SFTT in a fair and proper manner. Many people

were involved and the evidence in this case indicates that a proper sale was consummated based on sound business decisions. Santa Fe did not have as a principal purpose the evasion or avoidance of withdrawal liability when it sold SFTT. The principal purpose was to sell SFTT for intelligent business reasons and not to evade or avoid withdrawal liability.

AWARD

Santa Fe did not have as "a principal purpose" the evasion or avoidance of withdrawal liability when it sold SFTT. The Arbitrator once more is awarding in favor of Santa Fe on all issues presented.

ROBERT L. MITRANI, Arbitrator
December 15, 1992

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SANTA FE PACIFIC CORPORATION,

Plaintiff,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Defendant.

No. 92 C 0677
Hon. Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

Defendant Central States, Southeast and Southwest Areas Pension Fund ("Central States") has moved under Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend our Memorandum Opinion and Order of August 20, 1992 (the "Opinion"). In that Opinion, we granted Central States' motion to vacate the arbitrator's award, and we remanded this case to the arbitrator for clarification of the standard he applied under 29 U.S.C. § 1392(c). We also denied Plaintiff Santa Fe Pacific Corporation's ("Santa Fe") motion to confirm the arbitrator's award.

Central States raises three issues in its current motion. First, it asserts that we misunderstood its argument that Santa Fe is liable for a partial withdrawal because of a seventy percent decline in contribution levels, and it asks us to remand this issue to the

arbitrator.[1] Second, it requests clarification regarding our suggestion in the Opinion that the two-pronged "objective/subjective" test formulated by Judge Moran in *In re Int'l Harvester's Disp. of Wisconsin Steel Litig.*, 681 F. Supp. 512 (N.D. Ill. 1988), is an appropriate guideline for determining a violation of 29 U.S.C. § 1392(c). Third, it requests that we remand this case to a new arbitrator. We have already rejected the last request,[2] so we address only the first two issues in this Opinion. For the reasons set forth below, we grant Central States' motion in part and deny it in part.

Discussion

We note as a preliminary matter that Rule 59(e) is not available to Central States given the posture of this case. Rule 59(e) applies only to "final" judgments. *National R.R. Passenger Corp. v. New Castle County*, 636 F. Supp. 1482, 1486 (D. Del. 1986). "'Judgment' as used in [the Federal Rules of Civil Procedure] includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). Our decision, set forth in the Opinion, is not an appealable order, for the parties must move again in this Court to confirm or to vacate the arbitrator's award after the arbitrator issues his new Report.

As a result, if we are to consider the motion at all, we must treat it as a common law motion for reconsideration. *Rodgers v. Sullivan*, 1991 WL 274446, n.1 (N.D. Ill. Dec. 13, 1991); *Above the Belt v. Mel Bohannan Roofing*, 99 F.R.D. 99, 101 (E.D. Va. 1983). Because we believe that consideration of the issues presented in the motion will clarify our views for the benefit of the arbitrator, we will consider them.

I. Partial Withdrawal Liability

Central States had argued in its motion to vacate the arbitrator's award that the arbitrator had failed to rule on the

---

[1] Central States asked alternatively that we certify the seventy percent decline issue to the Court of Appeals. We denied this request in our Order of September 11, 1992.

[2] *See* Order of September 11, 1992.

threshold question of whether Santa Fe had experienced a seventy percent decline in contribution levels from 1983 through 1985 so as to constitute a partial withdrawal under 29 U.S.C. § 1385 (1985). We rejected this argument at that time because we found that Central States was attempting to hold Santa Fe responsible for the withdrawal liability of SFTT alone, but that at the time of Santa Fe's sale of SFTT, which occurred midway through the three-year test period required by § 1385, SFTT may have ceased to be a member of the Santa Fe control group and may have become a member of the Rail Services, Inc., control group. We held:

> Central States cannot attribute SFTT's contribution levels in the latter half of 1984 and in 1985 to Santa Fe *at all* unless Central States can avail itself of § 1392(c), so that the sale can be disregarded, or unless Central States can show the sale of SFTT's stock was not a change in corporate structure within the meaning of § 1398.

Opinion at 7-8.

We noted in the Opinion that Central States had failed to provide us with a single citation to the arbitration record to demonstrate that the contribution levels of any entity purportedly in the Santa Fe control group, other than SFTT, were submitted in evidence to the arbitrator. Now Central States provides to us for the first time information apparently compiled from Central States Exhibit 177, one of well over one hundred exhibits (as best we recall) that were used during the arbitration. On the basis of the information taken from this exhibit, Central States now attempts to give us facts to demonstrate the existence of the seventy percent decline in the Santa Fe control group's contribution levels.

Central States may not remedy on a motion for reconsideration omissions it made earlier in these proceedings. *See United States ex rel. Lynch v. Sandahl*, 793 F. Supp. 787, 795-96 (N.D. Ill. 1992) ("[A] motion for reconsideration may not be employed as a vehicle to introduce new evidence that could have been produced prior to the entry of judgment.") Central States has had repeated opportunities to present this argument but has consistently failed to do so in a coherent manner. Before the

arbitrator, Central States relied on two theories: first, that Santa Fe's sale of SFTT violated § 1392(c) because Santa Fe sold SFTT with the intent to "evade or avoid" its liabilities under the MPPAA; and second, that the sale did not constitute a "change in corporate structure" within the meaning of 29 U.S.C. § 1398. But it did not tell the arbitrator (in any meaningful manner that we could discern from the arbitration record) that it was relying on the seventy percent decline issue. Having failed to present the issue to the arbitrator for decision, Central States then addressed it squarely for the first time in its motion to vacate. Still, it failed to support its argument with any evidence which demonstrated that it had calculated the seventy percent decline based on the contribution levels of any entity other than SFTT.[3] Finally, in this motion, Central States has gotten around to identifying the specific evidence which it claims supports its position.

This is a problem, however, for Central States obviously knew about Exhibit 177, and the information it contained relating to the seventy percent decline, at the time of the arbitration hearing. It also knew about Exhibit 177 when it asked this Court to vacate the arbitrator's award. We believe that its failure to identify the evidence supporting its argument about a seventy percent decline before now is inexcusable. This piecemeal presentation of the issue has forced the parties and this Court to consider the issue twice, and, if we remand this issue as Central States requests, it would force the arbitrator to re-open the hearing as well. We are extremely dismayed by the cavalier manner in which Central States has repeatedly wasted the time and energy of everyone involved in this case.

And, to make matters worse, we think Central States' argument is wrong. As we said when we first rejected this argument,

> [w]hen SFTT left the Santa Fe control group in 1984, it took its contribution history with it. *See* § 1398. Unless Central States can establish that SFTT remained in the

---

[3] As we noted in the Opinion, Central States' argument on this issue in its brief in support of its motion to vacate contained no record citations at all. Opinion at 7.

> Santa Fe control group following the sale, a fact that cannot be assumed, Santa Fe had no responsibility for SFTT's contribution levels or withdrawal liability after 1984.

Opinion at 8. Thus, even with the information Central States now offers from Exhibit 177, Central States cannot succeed, for we believe that SFTT's contribution history followed it at the time of the sale. As a result, if Central States wanted to impose withdrawal liability on the Santa Fe control group, which after 1984 was composed solely of Santa Fe Terminal, such liability would have to be calculated on Santa Fe Terminal's contribution history alone.[4] As Central States' chart in its brief shows, this is not the calculation Central States made. (Def.'s Br. at 3.)

Central States argues that the PBGC has expressed the opinion that where a change in corporate structure within the meaning of § 1398 occurs, an "equitable allocation" of the resulting withdrawal liability must be made. Def.'s Br. at 7; *see* PBGC Op. Letter 92-1, 1992 PBGC-LEXIS 1 (March 30, 1992). Central States misstates the PBGC's position, which is that typically an allocation of the *contribution history* of the sold entity would be made between all entities which are "successors" within the meaning of § 1398. PBGC Op. Letter 92-1, 1992 PBGC-LEXIS at *6. Equitable allocation of contribution history is quite different than equitable allocation of withdrawal liability, for once the contribution history is allocated, there may be no withdrawal liability at all. We note also that the factual scenario which forms the basis of the PBGC's opinion is distinguishable from the factual scenario here, for the Santa Fe control group at issue here includes only SFTT and Santa Fe Terminal. Here, there is no "parent" corporation, as there is in the PBGC's hypothetical (*see* 1992 PBGC-LEXIS at *2), to which some portion of SFTT's contribution history should be allocated due to a history of "large transfers of covered operations or covered employees between members of the controlled group, or other unusual factors" (1992

---

[4] Santa Fe Terminal is merely another subsidiary of Santa Fe Pacific Corporation. *See* Def.'s Br. at 3.

PBGC-LEXIS at *6). There is only Santa Fe Terminal.[5] We can see no reason why Santa Fe Terminal, which has its own contribution history, should be allocated any portion of SFTT's contribution history.

Central States urges us to apply the PBGC's analysis regarding partial withdrawal liability as well. The PBGC suggests that where a seventy percent decline did not occur "solely because" of a change in corporate structure under § 1398, the sold subsidiary's contribution history must be included in determining the high base year of the parent's control group. 1992 PBGC-LEXIS at *10. This assumes that the sold subsidiary's contribution history stays with the parent for purposes of calculating a seventy percent decline under § 1385. However, the PBGC's analysis disregards completely the future operations of the sold subsidiary. As Santa Fe points out, this analysis would result in the imposition of partial withdrawal liability on a seller corporation even if the sold subsidiary had prospered (*and all contributions had been paid by the purchaser*) after the sale. This results in a windfall to the pension plan, which is paid twice for the unfunded vested pension benefit liability of the sold subsidiary: once by the seller, who pays the partial withdrawal liability, and a second time by the purchaser, who continues all contributions. Since this double payment would not occur if the subsidiary were never sold, we see little reason why it should occur merely because of the sale, where the sale does not result in any interruption of contributions by the sold entity. We do not read §1385 to require this result.[6] We believe the better interpretation is the one we discussed above: the contribution history of the sold entity goes

---

[5] Central States, in its briefing earlier and on this motion, is basing its argument on a control group composed of only SFTT and Santa Fe Terminal. *See* Def.'s Br. at 3.

[6] The MPPAA generally, and § 1385 specifically, are silent on the issue of how to treat the contribution history of an entity that is sold. We believe that our conclusion is consistent with the rationale of § 1398 that "a successor or parent corporation or other entity resulting from any such change [in corporate structure] shall be considered the original employer." 29 U.S.C. § 1398.

with it after the sale.[7] This analysis should apply regardless of whether the sold subsidiary flourishes or fails, since § 1385 does not require that the result depend on such circumstances.

For all of these reasons, we deny Central States' motion on the seventy percent decline issue.

II. The Wisconsin Steel Test

Central States also asks us to reconsider our suggestion that the two-pronged "objective/subjective" test formulated by Judge Moran in *In re Int'l Harvester's Disp. of Wisconsin Steel Litig.*, 681 F. Supp. 512 (N.D. Ill. 1988), is an appropriate guideline for determining a violation of 29 U.S.C. § 1392(c). *See* Opinion at 10. As Central States points out, Judge Moran in fact concluded that where the statutory provision contained language nearly identical to the language of § 1392(c), the objective prong of the test was inapplicable. *See Wisconsin Steel*, 681 F. Supp. at 527.

We agree with both Central States and Judge Moran, and we modify the Opinion regarding use of two-pronged *Wisconsin Steel* test. The language of § 1392(c), "a principal purpose . . . to evade or avoid liability," focuses on subjective intent alone. The inclusion of the objective prong of the test as a requirement of equal weight to the subjective prong would add to § 1392(c) an additional consideration that is not supported by the language of § 1392(c) itself.

We believe, however, that in the vast majority of cases objective facts regarding the viability of the purchaser will carry substantial weight as evidence of the seller's subjective intent. Thus, the objective viability of the purchaser, while not a separate prong entitled to equal consideration, will generally be a major

---

[7] We have little doubt that Central States served the notice of withdrawal liability on Santa Fe only because the Rail Services, Inc., control group (which SFTT joined after the sale) never paid SFTT's withdrawal liability, and that Central States would not have assessed partial withdrawal liability on Santa Fe if SFTT had not gone under. Under the analysis it proposes now, however, it was entitled to impose that liability on Santa Fe regardless of SFTT's fate.

factor in determining whether a seller had as "a principal purpose" the evasion or avoidance of liability. We believe this approach is consistent with the language of § 1392(c).

Our modification of the Opinion regarding the *Wisconsin Steel* test does not change the standard we articulated in the Opinion regarding § 1392(c). There we suggested the *Wisconsin Steel* test only in the context of Central States' argument that the arbitrator should have considered only Santa Fe's subjective intent, not the interest of the McKee-led employee group in purchasing SFTT. Opinion at 10. Thus, our conclusion regarding the proper standard to be applied under § 1392(c) remains the same. *See* Opinion at 3-5.

We add a *caveat* here as we did in the Opinion: we offer no opinion on whether the *Wisconsin Steel* test and the related analysis of subjective intent must be revisited on remand. *See* Opinion at 10. We have clarified our earlier discussion only to provide guidance; the arbitrator is free to determine if the issue is necessary to his clarification of the standard he applied under § 1392(c).

III. Santa Fe's Request for Reconsideration

Although Santa Fe failed to bring its own motion, it asks us to affirm the "sham" standard under § 1392(c) based on this Court's prior ruling in *Banner Indus. Inc. v. Central States Pension Fund*, 657 F. Supp. 875 (N.D. Ill. 1987) and the Seventh Circuit's recent decision in *Central States v. Cullum Cos., Inc.*, No. 91-2844, slip op. (Sept. 1, 1992). We rejected this argument when Santa Fe proposed it in its motion to confirm the arbitrator's award.

Having rejected this argument once, we will not affirm the "sham" standard now. What Santa Fe has done is merely to reiterate the arguments it made in its motion to confirm the arbitrator's award, an inappropriate use of a motion for reconsideration.[8] *United States ex rel. Lynch v. Sandahl*, 793

---

[8] We disagree with Santa Fe that this Court's decision in *Banner Industries, Inc. v. Central States*, 657 F. Supp. 875 (N.D.

(continued...)

F. Supp. 787, 796 (N.D. Ill. 1992).[9] What Santa Fe has not done is give us a good reason to change our mind.

Santa Fe has brought to our attention the Seventh Circuit's recent decision in *Central States v. Cullum Cos., Inc.*, 1992 WL 209694 (Sept. 1, 1992). As we read that decision, it is neither inconsistent with the standard under § 1392(c) that we articulated in the Opinion nor in any way controlling in this case. *Cullum* did not address the question of the standard under § 1392(c), for the case did not involve that provision, as the Seventh Circuit noted. 1992 WL 209694, at *6 ("The parties agree that neither [29 U.S.C. § 1384(a)(1) nor 29 U.S.C. § 1392(c)] applies in this case.") The Court mentioned the words "sham transactions" only in considering the arbitrator's express concern that § 1384(a)(1)(A)

---

[8](...continued)
Ill. 1987), is inconsistent with our Opinion in this case. The issue before us in *Banner Industries* was not the appropriate standard under § 1392(c), but whether the determination that Banner's sale of its subsidiary's stock to an ESOP caused Banner to cease to be an "employer" under the MPPAA, and whether that question had to be decided by this Court or an arbitrator. 657 F. Supp. at 879-83. Nothing in that decision constitutes a holding that the language of § 1392(c) requires a finding that a transaction must be a "sham" or "fraud" to violate that provision, which is the position Santa Fe wishes us to take now.

[9] As the court said in *Lynch*, "'[T]his Court's opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure.'" 793 F.2d at 796 (quoting *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988)). The argument that we were wrong in rejecting the "sham" standard is more properly addressed to the Court of Appeals. *See Refrigeration Sales Co. v. Mitchell-Jackson, Inc.*, 605 F. Supp. 6, 7 (N.D. Ill. 1983), *aff'd*, 770 F.2d 98 (7th Cir. 1985).

did not adequately safeguard the pension plan's interests. *Id.*[10] Section 1384 explicitly exempts a "bona fide, arms-length sale of assets" from withdrawal liability. *Id.* We believe that the standard of "sham" or "fraud" is clearly appropriate under the "bona fide, arms-length" language of § 1384, for the focus there is an objective one. In contrast, § 1392(c) does not exempt a "bona fide, arms-length" transaction; rather, it prohibits any transaction which has as "a principal purpose" the evasion or avoidance of liability. By this language, it focuses on the subjective intent of the seller. We do not read the Seventh Circuit's limited discussion in *Cullum* as a determination that a transaction must constitute a "sham" or "fraud" to violate § 1392(c).

---

[10] The Seventh Circuit's discussion of the "sham transaction" issue states, in its entirety:

> The third flaw in the arbitrator's analysis is his belief that taking section 1384(a)(1)(A) at face value would 'emasculate the intended purpose of preventing erosion of the plan's contribution base.' Section 1384 taken as a whole does not leave multiemployer pension plans or employees unprotected. The pension plans and employees are protected, but the safeguards appear in other subsections of section 1384 and the MPPAA. For example, the section 1384 exemption applies only to 'bona fide, arm's-length sale of assets to an unrelated party.' 29 U.S.C. § 1384(a)(1). Similarly, 29 U.S.C. § 1392(c) provides that '[i]f a principal purpose of any transaction is to evade or avoid liability,' the withdrawal liability provisions of the MPPAA 'shall be applied (and liability shall be determined and collected) without regard to such transaction.' These two provisions ensure that businesses cannot avoid withdrawal liability through sham transactions. The parties agree that neither provision applies in this case.
>
> 1991 WL 209694, at *6.

The standard we articulated in the Opinion, that evasion or avoidance of liability must be a significant or central factor behind a transaction, is less stringent than the "sham" or "fraud" standard which Santa Fe advocates. Obviously, under our standard any transaction which constituted a "sham" or "fraud" would violate § 1392(c); so would a transaction which was not a "sham" or "fraud" but had as "a principal purpose" the evasion or avoidance of liability. The example given by Judge Moran in *Wisconsin Steel* is illustrative: the sale of a business to a purchaser which is a Fortune 500 company would hardly constitute a "sham" or "fraud" under any common meaning of those terms, but where the seller had as a principal purpose the evasion or avoidance of its liability under the MPPAA, then the transaction would violate § 1392(c) and could be disregarded in determining withdrawal liability. *See Wisconsin Steel*, 681 F. Supp. at 527. We do not believe that this standard is inconsistent with the Seventh Circuit's comment in *Cullum*.[11]

Conclusion

We grant Central States' Motion to Alter or Amend Judgment with regard to the *Wisconsin Steel* test, and we clarify our position on that test in this Opinion. We deny the remainder of Central

---

[11] Santa Fe bases its argument in part on our citation to the Sixth Circuit's decision in *Teamster's Pension Trust Fund v. Central Michigan Trucking*, 857 F.2d 1107 (6th Cir. 1988). We cited that case only in footnote 4 of the Opinion, in which we declined to adopt for § 1392(c) the meaning of "sham or fraud" used in the Tax Code, as Santa Fe urged us to do. In *Teamster's Pension Trust Fund v. Central Michigan Trucking*, 857 F.2d 1107 (6th Cir. 1988), the Sixth Circuit rejected a similar argument for analogizing to the Tax Code the language of a different section of the MPPAA. Footnote 4 of the Opinion is incorrect to the extent it states that the Sixth Circuit had considered § 1392(c) in that case; we intended to say that the Sixth Circuit is the only circuit to address the argument that the MPPAA should be analogized to the Tax Code and that it has rejected that argument.

States' motion. We also deny Santa Fe's "request" that we require the arbitrator to use a "sham" standard under 29 U.S.C. § 1392(c).

ENTER:_____
PAUL E. PLUNKETT
UNITED STATES DISTRICT JUDGE

DATED: October 6, 1992

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SANTA FE PACIFIC CORPORATION,

Plaintiff,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Defendant.

No. 92 C 0677

Hon. Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

This case comes to us on the parties' cross-motions for summary judgment. Plaintiff Santa Fe Pacific Corporation ("Santa Fe") seeks to affirm the arbitrator's award in its favor, and Defendant Central States, Southeast and Southwest Areas Pension Fund ("Central States") desires to vacate that award. In support of its motion, Central States has raised a number of grounds of alleged error by the arbitrator. One of these grounds is the appropriate legal standard to be applied under 29 U.S.C. § 1392(c) (1985) to determine if "a principal purpose" of a transaction is "to evade or avoid liability" under the Multiemployer Pension Plan Amendment Act ("MPPAA"), 29 U.S.C. § 1381 *et seq.*

Both parties advocated before the arbitrator standards under § 1392(c) that we find are incorrect as a matter of law, and we are not certain that the arbitrator applied the correct standard. Therefore, we grant Central States' motion, vacate the arbitrator's Opinion and Award, and remand this matter to the arbitrator for

action consistent with this Opinion. We deny Santa Fe's motion to confirm the arbitrator's award. We address the remaining issues raised by the parties in order to provide appropriate guidance to the arbitrator.

Discussion

I. The Legal Standard of Section 1392(c)

This matter arises from Central States' efforts to obtain payment of withdrawal liability regarding Santa Fe Trails Transportation, Inc. ("SFTT"), a former subsidiary of Santa Fe, from Santa Fe following SFTT's bankruptcy.[1] After Santa Fe received the notice of withdrawal liability, it made a timely demand for arbitration. Central States argued two issues before the arbitrator: one, that the leveraged buy-out of SFTT by Rail Services, Inc., was a transaction which had as a principal purpose the evasion or avoidance of withdrawal liability in violation of 29 U.S.C. § 1392(c)[2]; and two, that the transaction was not "a change in corporate structure" within the meaning of 29 U.S.C. § 1398 (1992). The arbitrator ruled that Santa Fe had no withdrawal liability under either theory.

The first issue turns on the meaning of the language of § 1392(c), which states:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be

---

[1] The amount of the withdrawal liability was originally assessed at more than $7.5 million. As required under MPPAA, Santa Fe made interim payments to Central States until the arbitrator found in Santa Fe's favor. Santa Fe now seeks the return of the full amount of its payments with interest, an amount which now totals almost $10 million.

[2] Central States asserted before the arbitrator that Santa Fe and Rail Services, Inc., had entered into a conspiracy to avoid SFTT's withdrawal liability.

> applied (and liability shall be determined and collected) without regard to such transaction.

29 U.S.C. § 1392(c) (1985). At the hearing, Santa Fe argued that in order for its sale of SFTT to violate §1392(c), the arbitrator would have to find that the transaction was a sham or fraud, or that it had as *the* principal purpose the evasion or avoidance of liability. On the other hand, Central States contended essentially that, as long as it showed that Santa Fe had evasion or avoidance of liability as one of its purposes, it had established that Santa Fe had violated this section.

Because this is an issue of law, we review the arbitrator's determination *de novo*. *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 211-12 (7th Cir.), *cert. denied*, 493 U.S. 847 (1989).[3] The standard he applied is not clear, but it appears he may have adopted Santa Fe's position. In his Opinion, the arbitrator states several times that the sale of SFTT was not a "sham," that it was "bona fide," an "arm's-length" transaction, and that it did not have as *the* purpose the evasion or avoidance of liability. (Arb.'s Op. at 43, 44, 45, 47, 48.) Unfortunately, none of this language is not found in § 1392(c), and to the extent it is founded on a determination that evasion or avoidance was *the* principal purpose, it is contradicted by the plain language of the provision.[4]

By the same token, we do not agree with Central States' argument that it has proven that Santa Fe violated § 1392(c) by showing that the company considered withdrawal liability as one

---

[3] In contrast, the standard of review of an arbitrator's findings of fact is that "[t]he findings of fact . . . are presumptively correct and may be rebutted only by a clear preponderance of the evidence." 29 U.S.C. § 1401(c) (1985).

[4] We decline Santa Fe's invitation to adopt the "sham or fraud" meaning for § 1392(c) by analogy to the Tax Code, for this analogy has been squarely rejected by one of the very few federal courts of appeals to consider § 1392(c). *See, e.g., Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc.*, 857 F.2d 1107, 1111 (6th Cir. 1988).

of many factors in deciding to sell SFTT. Central States' interpretation would be proper if § 1392(c) required only that evasion or avoidance be "a purpose"; however, that section requires that it be "a *principal* purpose." The plain language of § 1392(c) requires that evasion or avoidance must be one of the significant or central factors. Under Central States' interpretation, the mere consideration of the impact of the MPPAA would constitute a violation of § 1392(c). We decline to read this provision so restrictively, with its obvious and severe ramifications for businesses contemplating any transaction involving potential liability under the MPPAA, without more specific direction from Congress.

It is only in the arbitrator's Conclusions of Law, adopted verbatim from those proposed by Santa Fe (including, as Central States complains, the signature of Santa Fe's counsel), that he states that he has found that Santa Fe did not have as "*a principal* purpose" the evasion or avoidance of liability when it sold SFTT. We give little weight to such a finding, as it is "not the original product of a disinterested mind." *Andre v. Bendix Corp.*, 774 F.2d 786, 800 (1985) (quoting *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977)). And, in any event, we are not convinced that it is an accurate reflection of the standard the arbitrator applied.

We remand this case to the arbitrator for reconsideration of the evidence presented by the parties in light of the standard under § 1392(c) that we have articulated here, as it is critical that we have the arbitrator's own thinking on the issue of whether or not Santa Fe had as "*a principal* purpose" the evasion or avoidance of withdrawal liability when it sold SFTT. We leave the question of additional briefing or evidence to the arbitrator's discretion.

We address another argument raised by Central States in order to offer some guidance to the arbitrator on remand. Central States asserted before us that the arbitrator's findings of fact failed to meet the standard of Rule 52(a) of the Federal Rules of Civil Procedure, as articulated by the Seventh Circuit in *Andre v. Bendix*

Corp., 774 F.2d 786, 800 (7th Cir. 1985).[5] While we do not hold that Rule 52(a) is applicable to arbitrator's findings, which are governed by 29 C.F.R. § 2641.7, the arbitrator should be cognizant of that rule and, specifically, of its requirement that the decision-maker's thinking be sufficiently articulated "to disclose to the reviewing court the steps by which the [decision-maker] reached [his or her] ultimate conclusion on each factual issue." *Andre*, 774 F.2d at 801.

II. Additional Issues

Central States raised several other issues which we address in order to clarify the status of this case on remand. The first of these issues is that the arbitrator failed to address what Central States characterizes as "the threshold issue" of whether Santa Fe had experienced a 70% decline in contribution levels from 1983 through 1985 so as to constitute a partial withdrawal under 29 U.S.C. § 1385 (1985). Central States argues before us that it did not seek to impose withdrawal liability on Santa Fe "solely because" of a change in corporate structure under § 1398, but rather, as we understand it, because of a 70% decline in Santa Fe's contribution levels from 1983 through 1985.[6] As a result, Central

---

[5] Rule 52(a) states, in pertinent part,

> In all actions tried upon the facts without a jury . . ., the court shall find the facts specially and state separately its conclusions of law thereon . . . .

Fed. R. Civ. P. 52(a) (1992).

[6] Section 1398 states, in pertinent part,

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—
>
> (1) an employer ceases to exist by reason of-

(continued...)

States reasons, the arbitrator's award to Santa Fe must be vacated (or, preferably, reversed) because he did not even address this basis for the assessment of liability.

The obstacle to this argument is the fact that Central States seeks, in this action, to hold Santa Fe responsible for the withdrawal liability of SFTT *alone*; this dispute is based upon the unfunded but vested pension benefits of *SFTT* employees. Central States has not shown us (or provided us with a single citation to the arbitration record) that the contribution levels of any other purported Santa Fe control group member were considered by Central States in determining that withdrawal liability existed. But, halfway through the three-year period of the alleged 70% decline, SFTT may have ceased to be a member of the Santa Fe control group and instead may have become a member of the Rail Services, Inc., control group. Central States cannot attribute SFTT's contribution levels to Santa Fe in the latter half of 1984 and in 1985 to Santa Fe *at all* unless Central States can avail itself of §1392(c), so that the sale can be disregarded, or unless Central

---

[6](...continued)

> (A) a change in corporate structure described in section 1369(b) of this title, . . .
>
> * * *
>
> if the change causes no interruption in employer contributions or obligations to contribute under the plan . . . .
>
> * * *
>
> For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

29 U.S.C. § 1398 (1992).

States can show the sale of SFTT's stock was not a change in corporate structure within the meaning of § 1398.[7]

It is inconceivable to us that Central States spent fifteen days presenting evidence to the arbitrator if it truly believed this matter could be resolved by arithmetic. If, as Central States argues now, Santa Fe had experienced a 70% decline in 1983 through 1985 *regardless* of the sale of SFTT, so that Central States had a truly independent basis for assessing liability against Santa Fe, why did Central States spend so much time and money to prove to the arbitrator that the sale should be disregarded? No one would care, for the sale would be irrelevant.

The answer is, of course, that this is not a matter of arithmetic, and the sale is very relevant. This entire dispute involves the unfunded but vested pension benefits of SFTT employees, not separate and distinct Santa Fe employees. As far as we can tell from Central States' briefs in this Court, the 70% decline that occurred in 1983 resulted solely from SFTT's contribution levels, at a time when SFTT was part of the Santa Fe control group. When SFTT left the Santa Fe control group in 1984, it took its contribution history with it. *See* § 1398. Unless Central States can establish that SFTT remained in the Santa Fe control group following the sale, a fact that cannot be assumed, Santa Fe had no responsibility for SFTT's contribution levels or withdrawal liability after 1984.

Central States' arithmetic regarding the 70% decline works only if we *assume* that SFTT remained a part of Santa Fe's control group after the sale. So, in essence, Central States asks us to assume in its favor (or claims the arbitrator should have assumed) the central issue in dispute between these two parties. Such an outcome is hardly likely, to say the least. The arbitrator need not address this issue on remand.

---

[7] Of course, the statutory presumption in favor of the pension fund's assessment means that Santa Fe bears the actual burden of showing that § 1392(c) does not apply or that the sale of stock falls under the rubric of § 1398.

The next issue raised by Central States is the arbitrator's alleged failure to address the statutory presumption of correctness of the pension fund's determination of liability. *See* 29 U.S.C. § 1401(a)(3)(A) (1985).[8] In response, Santa Fe asserts that the presumption is unconstitutional, as the pension fund is a biased participant in this dispute. We disagree with both parties. The presumption is valid, in our view, as long as it operates *only* as a burden-shifting device, which we believe is the proper reading of the provision. The presumption may not be given independent weight in the consideration of the evidence, which is the position we understand Central States to take, for that interpretation renders it a denial of due process. Here, although the arbitrator made no explicit reference to the presumption except in the Conclusions of Law, there is no evidence either that he failed to shift the burden of proof to Santa Fe or that he gave the presumption improper weight. We find no error in this aspect of the arbitrator's decision.

Central States also claims that the arbitrator's determination that Santa Fe did not violate § 1392(c) is incorrect because he considered the interest of the McKee-led employee group in purchasing SFTT to be critical to his finding that SFTT was viable at the time of the sale, which was at least part of the basis for his finding that Santa Fe did not act to evade or avoid liability under § 1392(c). (*See* Arb.'s Op. at 45.) Central States asserts that only the intent of Santa Fe should be considered, not the intent of such prospective purchasers. We find that the two-pronged analysis proposed by Judge Moran in *In re Int'l Harvester's Disp. of*

---

[8] Section 1401(a)(3)(A) states, in pertinent part,

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

29 U.S.C. § 1401(a) (3) (A) (1985).

Wisconsin Steel Litigation, 681 F. Supp. 512 (N.D. Ill. 1988), to be the appropriate method of resolving this issue. There, Judge Moran, in considering a nearly identical issue under ERISA (rather than the MPPAA), held that two requirements must be met to show evasion or avoidance of liability: one, the objective showing that the "spun-off" company was not economically viable following the transaction; *and* two, the subjective intent of the seller to rid itself of the unfunded pension liability. *Id.* at 526. To the extent that this analysis must be revisited on remand, a matter upon which we offer no opinion, the arbitrator should be guided by the *Wisconsin Steel* test.

Finally, Central States asserts that the arbitrator improperly refused to allow it both to cross-examine Santa Fe witnesses regarding certain documents and to examine a particular Santa Fe witness on the grounds of attorney-client privilege. During pre-hearing discovery, the parties, by agreement, submitted a dispute regarding Santa Fe's claims of attorney-client privilege as to both documents and deposition testimony of in-house attorneys, to a special prosecutor, the former Chief Judge of this district, Judge Frank McGarr. Judge McGarr made very specific findings first as to the legitimacy of the claims of privilege regarding certain categories of documents and, after *in camera* inspection, of individual documents themselves, as well as the determination that the in-house attorney had to respond to deposition questions regarding business matters. Pursuant to these rulings, Santa Fe produced all appropriate documents.

At the arbitration, Santa Fe attempted to use some of those documents during its direct examination of certain witnesses, but requested a stipulation from Central States that such use would not constitute a subject matter waiver of Santa Fe's attorney-client privilege as to other documents that Judge McGarr had not determined were not privileged. Central States refused. As a consequence, Santa Fe did nothing more than authenticate the documents in question with the witnesses, confirming that the witness had seen or read the document, or that his signature appeared on it. In fact, Santa Fe explicitly stated that it would not delve further into the content of the documents in order to avoid waiving its claim of privilege as to other documents. Central States now claims it was prejudiced because Santa Fe's limited

examination did serve to waive the privilege, and yet Central States was prohibited from delving into the subject matter generally. We find no merit in this argument. Under these circumstances, Santa Fe did not waive its privilege on the subject matter generally. Furthermore, Central States does not tell us how it believes the outcome of the arbitration would have been changed if waiver had been found and the desired examinations had been allowed.

As to the testimony of Santa Fe's in-house attorney, during Central States' cross-examination Santa Fe asserted the privilege and instructed the witness not to answer. The arbitrator did not comment on Santa Fe's instruction, but reminded the parties that he would be getting into certain evidence eventually. Central States then continued its cross-examination without requesting any determination from the arbitrator regarding Santa Fe's instruction not to answer.

Central States now claims that the arbitrator's failure to "take command" of the situation resulted in prejudice to Central States because it was precluded from cross-examining the witness as it desired. We disagree, as Central States did not even attempt to obtain a ruling from the arbitrator. While the Federal Rules of Evidence are not in effect during arbitrations, nonetheless a party may not continue examining a witness without any objection, formal or otherwise, to another party's instruction to the witness not to answer, and then cry foul when the proceeding has been concluded in its opponent's favor, in an effort to obtain a new hearing. Central States had a reasonable course of action available to it which would have resolved this issue while the hearing was in progress. Now, it would be necessary either to reconvene the arbitration months after its completion, or, worse yet, to reverse the arbitrator's decision. Central States may not acquiesce in Santa Fe's instruction and then use that acquiescence to support a claim of prejudice after it loses on the merits.

Conclusion

We grant Central States' motion, vacate the arbitrator's Opinion and Award, and remand this matter to the arbitrator for action consistent with this Opinion. We deny Santa Fe's motion to confirm the arbitrator's award.

ENTER: _____
PAUL E. PLUNKETT
UNITED STATES DISTRICT JUDGE

DATED: Aug. 20, 1992

APPENDIX H

AMERICAN ARBITRATION ASSOCIATION
MULTIEMPLOYER PENSION PLAN
ARBITRATION RULES

IN THE MATTER OF THE ARBITRATION

BETWEEN

SANTA FE PACIFIC CORPORATION
formerly known as SANTA FE
SOUTHERN PACIFIC CORPORATION

Claimant,

AND

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,

Respondent.

AAA CASE NO. 51 621 0012 88V

OPINION AND AWARD

This case was heard over fifteen separate hearings in Chicago, Illinois, before Robert L. Mitrani, Arbitrator, selected through the procedures of the American Arbitration Association.

The parties submitted post-hearing briefs and post-hearing reply briefs. Thereafter, on Saturday, November 9, 1991, the Arbitrator received the parties' Proposed Findings of Fact and Conclusions of Law at which time the Arbitrator began his final deliberations of this case.

APPEARANCES

SANTA FE: DAVID C. GUSTMAN, ESQUIRE
HARRY L. DE LUNG, JR., ESQUIRE
WESTON W. MARSH, ESQUIRE

CENTRAL STATES: JOHN P. MC ALLISTER, ESQUIRE
TERRENCE M. DENEEN, ESQUIRE
THOMAS S. GIGOT, ESQUIRE
THOMAS C. NYHAN, ESQUIRE
TERRENCE C. CRAIG, ESQUIRE

(A) INTRODUCTION

The parties are aware of the voluminous amount of testimony presented during the fifteen hearing days. The Arbitrator has studied all of the testimony and evidence.

The parties did an excellent job in summarizing their respective positions in their post-hearing briefs, post-hearing reply briefs and Proposed Findings of Fact and Conclusions of Law. Therefore, as part of this award, the Arbitrator is including excerpts from these documents. The Arbitrator wishes to make it clear that excerpts are only meant to indicate certain points made by the parties in their own words. The fact that a certain point or argument may not be in the excerpts below does not mean that the point was not carefully studied. In fact, the Arbitrator reviewed every point very carefully.

(B) EXCERPTS FROM THE POST-HEARING BRIEFS

Santa Fe

"In its opening statement, Santa Fe outlined what Central States would be unable to prove:

i. That Santa Fe conspired with Rail Services, Inc. ('RSI') to evade or avoid payments to Central States as mandated by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§1381 et seq. ('MPPAA');

ii. That Santa Fe had no legitimate business purposes for the sale of SFTT;

iii. That the sale of SFTT was a sham or pretext to evade or avoid MPPAA; or

iv. That the sale of SFTT caused the failure of SFTT and the resultant withdrawal liability."

"We also told you that the evidence would clearly show:

i. That Santa Fe was aware of MPPAA shortly after it became law in late 1980;

ii. That Santa Fe sought and obtained expert advice to understand MPPAA and its impact on SFTT;

iii. That Santa Fe decided to sell SFTT primarily for several legitimate reasons which had nothing to do with MPPAA and

iv. That Santa Fe had a long-standing and appropriate policy of reviewing each of its operating subsidiaries to maximize the return on its investments and to sell or divest those companies that did not meet Santa Fe's expectations."

"During the course of the hearing Central States either admitted or did not refute many of the central issues in this case. Central States admitted that it had no evidence that Santa Fe and RSI had any agreement, much less a conspiracy, to evade or avoid MPPAA obligations to Central States. Central States admitted that Santa Fe had several reasons to sell SFTT that had nothing to do with MPPAA. This admission was consistent with the testimony of every fact witness who had contemporaneous knowledge of the business reasons for the sale of SFTT and the arm's length negotiations between Santa Fe and RSI.

Central States also admitted it had no evidence that the sale of SFTT was fraudulent. Further, no evidence

was adduced at the hearing that the sale was a sham or pretext. In fact, Central States conceded it had no evidence that the sale of SFTT was other than bona fide or arm's length."

"As the hearing progressed and Santa Fe's testimony was received without serious challenge, it became clear that Central States no longer contested the sale of SFTT on the basis that it was undertaken for the principal purpose to evade or avoid withdrawal liability. Instead, Central States focused its contentions on the economic viability of SFTT prior to the sale and its claim that the sale of SFTT 'caused' the failure of SFTT and the resulting withdrawal liability.

Not only did the evidence offered by Santa Fe refute Central States' assertions that SFTT was not viable and its bankruptcy was reasonably foreseeable at the time of sale, Central States' own expert witness admitted that these claims were without support. Mr. Gaston testified that SFTT was 'alive' prior to its sale and was surviving at the time it was sold. He refused to opine that SFTT was not viable prior to the sale or after the sale, as promised by Central States in its opening statement.

Mr. Gaston admitted that, during the two years immediately preceding the March, 1983 decision to sell SFTT, the company was profitable. He further admitted that many financial trends during this pre-sale decision period were healthy. Mr. Gaston also candidly admitted that in 1983 and 1984 he could not have predicted whether or not SFTT would lose money in the future. He admitted that he would not have forecasted in 1984 the number of business failures that would befall the trucking industry. Most importantly, Central States' own expert could not have foreseen, at the time SFTT was sold, that it would fail. He further admitted that none of the actual participants in the sale of SFTT foresaw the bankruptcy."

"As established at the hearing and summarized below, Santa Fe has proved that the sale of SFTT was not for the principal purpose to evade or avoid withdrawal

liability. The failure of SFTT was not reasonably foreseeable at the time of the sale. The uncontroverted evidence has established that the failure of SFTT in 1984 was caused by numerous post-sale transactions and events for which Santa Fe cannot be held responsible. Central States' assessment of partial withdrawal liability against Santa Fe, therefore, was unreasonable and should be set aside."

Thus, it is clear that MPPAA's 'evade or avoid' provision, like the parallel provisions of the Tax Code, do not prohibit deliberate plans to minimize liability, provided that the transaction itself is 'bona fide.' 'arm's length,' and has 'economic substance.' The transaction cannot be a mere subterfuge, a form of self-dealing, or an exaltation of form over substance. If there is economic substance, the transaction should not be disturbed merely because taxes, or withdrawal liability, are thereby not maximized."

"Santa Fe has consistently stated that, for Central States to prove the sale of SFTT was evasive, it must prove that the most important reason behind the sale of SFTT was to evade or avoid contingent withdrawal liability. Even if one of the reasons to sell SFTT was to evade withdrawal liability—which it was not—Central States could not prevail. Central States is required to prove that the dominant motive for the sale was to evade or avoid withdrawal liability."

"In contrast to the typical 'evade or avoid' case, this was not a contrivance involving shell corporations or circular movements of money, nor was it a self-dealing transaction or the elevation of 'form over substance.' In fact, witnesses for Central States acknowledged at trial that the sale was 'bona fide' and 'arm's length,' and had 'several potential legitimate purposes.' Under the controlling law, these admissions alone are sufficient to justify a ruling favor of Santa Fe."

"Section 1398 allows businessmen to undertake corporate sales such as the sale of SFTT, however, such transactions must be bona fide and have 'economic substance,' or else the transactions may be disregarded under the 'evade or avoid' provisions of §§1392(c). This statutory format is familiar to legislators and courts; it is the same organization employed by the Tax Code. In this case, there was arguably a 'change in corporate structure' when SFTT was sold by Santa Fe in July, 1984. After its sale, SFTT continued to be responsible under §1398 as if it were 'the original employer.' Under this section, Santa Fe no longer belonged to the SFTT control group because it no longer owned SFTT."

"For all of the reasons recited in this section, §§1398 should not be construed as a deep-pocket remedy for pension funds and is not applicable to the assessment of withdrawal liability here. However, even if one assumes that this section provides a remedy for a sale that 'causes' an interruption in contribution base units, the evidence, reviewed below in the Statement of Facts, would not support a finding of liability.

The sale of SFTT cannot be said to have 'caused' its failure if, at sale, the company had valuable assets and a capacity to succeed. In other words, if SFTT was viable when sold, the unfortunate fact that the new owners failed to manage the company effectively should not be ascribed to the sale itself. The evidence in this case showed that SFTT was indeed viable before and after the sale, as shown by the competing bids and by the testimony of the numerous participants to the transaction.

The evidence also showed the true reasons for the failure of SFTT, including the purchase of the insolvent BN companies and their merger with SFTT, the transfer of SFTT assets including its SpeCom division, the disastrous illegal strike in December, 1984, the failure of Teamster renegotiations, departure from the business plan, and expensive non-essential expenditures. All of these factors caused SFFT's failure.

"Following the fact testimony regarding the reasons for the sale of SFTT, both parties offered expert testimony. Santa Fe's two experts, Dr. Silberman and Mr. Hinkel, had reviewed the testimony of all the important witnesses and considered factual evidence before and after the sale. Both experts were able to state that SFTT was sold for valid business reasons, based upon their experience and knowledge of the trucking industry and of similar transactions.

Dr. Glaskowsky, the industry expert for Central States, also offered his opinion regarding the purpose of the SFTT transactions. In fact, he described at least five purposes, unrelated to MPPAA, which were served by the sale of SFTT:

1. '[un]willingness on the part of SFI's top management to admit failure on the part of a corporate subsidiary.'

2. 'Convenience of having RSI take over the sale of Trails' assets.'

3. 'avoidance of a need for public admission of the need to liquidate a subsidiary.'

4. 'to focus the corporation on its profitable enterprises and 'achieving strategic fit.'

5. 'it was possible that they were savings jobs.'

Summarizing his analysis, Dr. Glaskowsky agreed that there were several possible legitimate purposes for the sale.

> Q. But there were several possible legitimate purposes of this transaction in your opinion?
>
> A. Many actions have more than one aspect to them.
>
> Q. The answer to my question, though, is yes?

A. Yes, yes, yes.

As between these various purposes, Dr. Glaskowsky could not ascertain which one was the 'principal purpose.'

Q. But your opinion was that you didn't have an opinion as to which purpose was the principal purpose, isn't that right?

A. I think they were all associated.

These admissions alone are sufficient to justify a ruling in favor of Santa Fe in this case. The retained expert and spokesperson for Central States admitted on the record that this transaction had 'several possible legitimate purposes' and that none was the 'principal purpose.' This directly contradicts the promise of Central States that it would prove that MPPAA avoidance was the 'single motivating factor behind the transaction.' Having failed to present the promised proof, Central States cannot prevail."

"MPPAA was enacted during the period of SFTT's evaluation, and the consequences of the new law were considered in the course of the analysis. By concentrating on this consideration of MPPAA and ignoring the overwhelming business issues, Central States argues that withdrawal liability was the 'overriding concern at all times' in the sale of SFTT.

The record in this proceeding is clear that SFTT was sold for numerous legitimate business reasons, and that MPPAA was considered only because it was one of several contingent liabilities facing SFTT. It was part of Mr. Schmidt's methodical approach to include all pertinent issues in his analytical process, and the consequences of a new law such as MPPAA was naturally looked at, as were a multitude of other relatively minor concerns."

"Santa Fe's evidence that the SFTT sale was bona fide and arm's length was so strong that Central States actually conceded that the transaction was legitimate. Witnesses for Central States expressly disavowed any

attempt to disprove that the sale was bona fide and arm's length. Mr. Ed Young, the initial investigator for Central States, denied he has ever questioned the bona fide or arm's length nature of the sale. Later, Dr. Glaskowsky testified for Central States that he had 'no knowledge' of any improper intent or lack of good faith in the sale. Dr. Glaskowsky testified that the sale was 'bona fide' in the Webster's sense of 'done or made in good faith, sincere, authentic, genuine,' and that 'it [the SFTT sale] was a transaction that met those tests.'"

"In this case, the record uniformly indicates that MPPAA was not singled-out as a special concern; rather, it was treated and analyzed just like every other potential cost involved in the transaction. In the liquidation scenario, it was inescapable that the termination of SFTT's operations would precipitate withdrawal liability, and consequently every liquidation estimate projected that cost. However, when estimates were prepared of the cost involved in a stock sale of SFTT, no MPPAA liabilities were projected, based upon Santa Fe's legal understanding that 'upon the sale of SFTT stock, no complete or partial withdrawal liability would be incurred by SFI.'"

"Fact testimony regarding the viability issue was reviewed previously in this brief. We need only recall here that six credible, unimpeached witnesses (Schmidt, McKee, Nassimbene, Sells, Jorgenson, and Lewensohn) testified to their straightforward belief that SFTT was viable before and after the sale. Based upon the testimony, it is clear that at least 30 middle managers and nine banking institutions also believed in SFTT's viability. Moreover, the fact witnesses described the unforeseen events and management decisions which suddenly turned SFTT on a new course after the sale, heading the company toward solvency in 1985."

"However, Central States has provided no evidence that the sale itself caused the bankruptcy. Instead, the evidence shows that numerous developments after the sale caused SFTT to fail, thereby triggering the withdrawal liability. Some of these developments were

orchestrated by the new owners of SFTT. Some of the developments were out of their control. In any event, the post-sale developments were unforeseeable by—and beyond the control of—Santa Fe."

"RSI's Purchase of the BN Companies was a Major Cause of SFTT's Failure."

"On December 3, 1984, Teamsters Local 710 began illegally picketing SFTT's Chicago terminal. The strike was precipitated by the merger of the BN companies with SFTT."

"RSI had anticipated that the unions would be more accommodating to SFTT once it emerged from its large conglomerate ownership and became a more independent carrier. RSI expected that the unions would provide the same terms as being given to SFTT's competitors. The unions' failure to live up to this expectation cost the company business."

"Central States' assessment of withdrawal liability against Santa Fe was erroneous and unreasonable. The sale of SFTT was not made for the principal purpose of evasion or avoidance of contingent withdrawal liability. To the contrary, the uncontroverted evidence confirms that the sale of SFTT was motivated by several legitimate business reasons having nothing to do with MPPAA evasion or avoidance.

The failure of SFTT, and the apparent inability of Central States to satisfy its claim for withdrawal liability against SFTT in the bankruptcy, cannot be the basis of Central States' assessment against Santa Fe. Under these circumstances, MPPAA was never intended to impose a 'deep-pocket' approach to pension fund financing in the event of business failure or corporate restructuring."

"Regardless of the application of presumptions or burdens of proof, Central States' assessment must be found unreasonable. The evidence, when viewed in its entirety, compels a finding in favor of Santa Fe. For all of the foregoing reasons, Santa Fe respectfully requests that

Central States' assessment of withdrawal liability be set aside."

Central States

"The Central States, Southeast and Southwest Areas Pension Fund (the 'Fund' or 'Central States') assessed withdrawal liability against Santa Fe Pacific Corporation ('Santa Fe') for a partial withdrawal from the Fund under Title IV of the Employee Retirement Income Security Act of 1974 ('ERISA'), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ('MPPAA'), 29 U.S.C. §§1301-1461 (1988). Santa Fe challenged the Fund's assessment, and initiated this arbitration in accordance with section 4221(a) of ERISA, 29 U.S.C. § 1401(a)."

"The parties have agreed to bifurcate the arbitration proceeding. Santa Fe and the Fund request that the Arbitrator first decide whether Santa Fe is responsible for a statutory withdrawal from the Fund under MPPAA. If the Arbitrator decides that Santa Fe is responsible, Santa Fe may thereafter challenge the amount of its withdrawal liability, as requested in its arbitration demand.

This brief addresses the threshold issue of whether Santa Fe is responsible for withdrawal liability under the Fund. Simply put, that issue requires the Arbitrator to decide whether Santa Fe was a statutory 'employer' responsible for withdrawal liability and, if so, whether Santa Fe ceased to be the responsible employer as a result of its disposition of its trucking subsidiary, Santa Fe Trail Transportation Company ('SFTT' or 'Trails') in a highly leveraged buyout ('LBO'). In deciding this threshold issue, it is necessary first to determine whether, in ridding itself of SFTT's stock through the LBO, Santa Fe Industries had 'a principal purpose . . . to evade or avoid [withdrawal] liability' so that the stock transfer must be disregarded under ERISA section 4212(c), 29 U.S.C. § 1392(c). Even if the stock transfer is given effect, a second question is whether Santa Fe is liable to the Fund because the LBO transaction, which stripped SFTT of

Santa Fe's life-sustaining support, caused SFTT's imminent collapse and the resulting interruption in employer contributions to the Fund. If so, ERISA section 4218(1), 29 U.S.C. § 1398(1), will not insulate Santa Fe from responsibility for the withdrawal liability.

If the answer to either of those questions is 'yes', then Santa Fe is liable to the Fund for withdrawal liability. *See Banner Industries, Inc. v. Central States Pension Fund*, 11 E.B.C. 1149, 1151 (1989) (Graham, Arb.). As shown below, the answer to both questions is an unqualified 'yes.'"

"That written record leaves no doubt that: (A) Santa Fe clearly understood that SFTT was not a viable motor carrier and, therefore, needed to be eliminated; (B) in deciding how to rid itself of SFTT, Santa Fe Industries' overriding purpose was to avoid the withdrawal liability that would be triggered upon SFTT's liquidation or inevitable collapse; and (C) stripped of Santa Fe's support, SFTT was doomed to collapse little more than six months after the LBO closed. In stark contrast to the retrospective rationalizations Santa Fe now offers in 1991, Santa Fe's own contemporaneous written records show in particular that:

1. Santa Fe knew that SFTT was a 'perennial loser'; in the common carrier industry, and could 'not compete' in the post-1980, deregulated industry. Indeed, as a railroad-affiliated 'pocket' trucker, SFTT was counted by Santa Fe as being 'among the living dead.'

2. Santa Fe knew that the decline in SFTT's business and pension plan contribution base units ('CBUs') threatened to trigger withdrawal liability of more than $11 million, including more than $7.5 million to this Fund alone.

3. In an attempt to 'defer' that withdrawal liability, Santa Fe directed that SFTT

recall laid-off Teamster employees for one day per week in 1982. Santa Fe reasoned that this strategy would increase SFTT's CBUs under the Fund and 'buy time against the very probable day when Santa Fe is presented with a UVB liability bill.'

4. Although SFTT did in fact recall laid-off Teamster employees for one day per week in 1982, Santa Fe decided in early 1983 to discontinue that practice, 'holding off until after meeting with Kearney people.' As a result, SFTT fell below the 'ERISA 30% Danger Zone' beginning in 1983, never to resurface.

5. In fact, by early 1983, Santa Fe and its expert consultant on the trucking industry, A.T. Kearney, Inc. ('A.T. Kearney'), determined that the cost of keeping SFTT in business was exceeding the cost of closing SFTT and paying withdrawal liability. Therefore, A.T. Kearney recommended that SFTT's common carrier operations 'be shut down as soon as possible' because 'Santa Fe Industries would be better off financially without Santa Fe Trails common carrier operations even though Santa Fe Industries incurred MEPPA liabilities.'

6. Before closing SFTT and paying withdrawal liability, Santa Fe decided it would first attempt to avoid that liability by transferring away SFTT. Santa Fe Industries' president stated that he would 'make an effort to locate a purchaser for the company. If a purchaser can be located, there is a good possibility of transferring [sic] part or all of a rather substantial liability which the company is incurring under the Multiemployer

Pension Plan Amendments Act (MPPAA).'

7. In attempting to locate a purchaser, Santa Fe first looked for a 'large, financially strong purchaser.' Santa Fe reasoned that 'for our protection—buyer must continue in business for a number of years, however; otherwise we could be subject to the withdrawal liability on the theory that our sale was fraudulent and an attempt to evade MPPA.'

8. Unable to find a financially-responsible entity to buy the foundering trucker, Santa Fe opted to dispose of SFTT's stock on a highly-leveraged basis by transferring the stock to a corporate shell established by a small, thinly-capitalized freight consolidator.

9. As predicted by Santa Fe and A.T. Kearney, SFTT's common carrier operations continued to generate losses of hundreds of thousands of dollars per month. In December 1984, the Santa Fe Railroad opened SFTT's lucrative cartage contracts to outside bidding, thereby withdrawing its vital support of the one profitable sector of SFTT's business. Out of cash, SFTT stopped making pension contributions to this Fund in December 1984, and soon collapsed altogether."

"As the summaries demonstrate, SFTT was not a viable motor carrier. Even before deregulation, SFTT's operating ratios were dangerously high. Indeed, they were no different from the average operating ratios of those carriers that ultimately failed following deregulation. As a rail-affiliated trucker, moreover, SFTT lacked the route structure and terminal network needed to compete in the

deregulated industry. Compounding this, SFTT's trucks, tractors, and trailers were old and deteriorating quickly. The costs needed to replace SFTT's worn equipment alone would be substantial, and were certainly beyond the reach of SFTT's new owners after the July 6, 1984 transaction.

What viability SFTT did have resulted from the support provided by Santa Fe and its other affiliates. As a member of the Santa Fe family, for example, SFTT enjoyed easy access to loans and credit. When Santa Fe disposed of SFTT in the July 6, 1984 transaction, SFTT lost this vital support, and became even less viable than before."

"Santa Fe and its dominant Railroad affiliate operated SFTT as their wholly-owned subsidiary for the 50-odd years of its existence leading up to the July 6, 1984 LBO. It is undisputed, therefore, that at least until that date, Santa Fe was an 'employer' subject to withdrawal liability under Title IV of ERISA. *See Banner Industries, Inc. v. Central States Pension Fund*, 657 F. Supp. at 881-83. The only question is whether Santa Fe found a safe haven from that withdrawal liability by ridding itself of SFTT's stock through the LBO some six months before SFTT collapsed."

"However, another statute enacted in 1980—MPPAA—imposes an additional cost (withdrawal liability) on employers like Santa Fe when they completely or partially withdraw from a multiemployer pension plan. ERISA section 4201, 29 U.S.C. § 1381. Santa Fe soon recognized that reducing or eliminating SFTT's common carrier operations would trigger Santa Fe's withdrawal from eight multiemployer pension plans. In fact, Santa Fe discovered by 1982 that the sharp decline in SFTT's employment levels had already threatened to trigger a $7.5 million withdrawal liability to this Fund under MPPAA's partial withdrawal liability provisions.

Desperate to remove itself from the path of that liability, Santa Fe engineered the LBO as a device for ridding itself of SFTT's stock. Santa Fe now claims that

the LBO insulated it from any responsibility for its proportionate share of the UVB costs attributable (in part) to SFTT's historical participation in the Fund.

As the court made clear in *Banner Industries*, however, an employer like Santa Fe 'will be liable for withdrawal liability, § 1381, unless that *employer* finds a statutory safe have.' *Banner Industries, Inc. v. Central States Pension Fund*, 657 F. Supp. at 882 (emphasis in original). Here, the only statutory 'safe haven' arguably available to Santa Fe is ERISA section 4218(1), which provides in relevant part that —

> an employer shall not be considered to have withdrawn from a plan *solely because* —
>
> (1) an employer ceases to exist by reason of —
>
> (A) a change in corporate structure described in section 4069(b) or
>
> (B) a change to an unincorporated form of business enterprise,
>
> *if the change causes no interruption in employer contributions or obligations to contribute under the plan* . . . .

29 U.S.C. § 1398(1) (emphasis added).

Santa Fe can find no refuge in this provision for two reasons. First, because Santa Fe had 'a principal purpose . . . to evade or avoid [withdrawal] liability.' its transfer of SFTT's stock in the LBO must be disregarded under ERISA section 4212(c), and liability determined and collected as if the transfer had never occurred. Section 4212(c) of ERISA provides that:

> If a principal purpose of any transaction is to evade or avoid [withdrawal] liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

U.S.C. § 1392(c)

Second, even if the stock transfer is given effect, Santa Fe has not satisfied the requirements of ERISA section 4218(1), 29 U.S.C. § 1398(1). Section 4218(1) of ERISA provides that an employer shall not be considered to have withdrawn from a multiemployer pension plan 'solely because' of a change in corporate structure. 29 U.S.C. § 1398(1). If that change (here the LBO) causes an 'interruption in employer contributions . . . [to] the plan,' then notwithstanding the LBO, Santa Fe remains liable. 29 U.S.C. § 1398(1). In other words, this statutory haven applies only to those routine corporate transformations that, while technically withdrawing one or more members of a corporate employer from a pension plan, are not accompanied by an interruption in pension plan contributions. Where, as here, the employer already is mired in a substantial withdrawal which fully matures on the heels of a change in corporate structure, ERISA section 4218(1) will not apply because the withdrawal was not 'solely because' of the change in corporate structure, and because there occurred an 'interruption in employer contributions . . . [to] the plan.' As a result, Santa Fe and other members of its controlled group are considered to have withdrawn from the Fund despite their July 6, 1984 disposition of SFTT."

"First, sections 4212(c) and 4218(1) of ERISA establish separate, and independent bases for enforcing liability. If the Arbitrator finds in favor of the Fund under either section, therefore, 'the demand of the Pension Fund for withdrawal liability payments must be affirmed.' *Banner Industries, Inc. v. Central States Pension Fund*, 11 E.B.C. at 1151."

"Second, in applying ERISA section 4212(c)'s evade-or-avoid rule, the phrase 'a principal purpose' must be given its plain meaning. 'The phrase must be read to indicate that if one of the motivating factors in the transaction was to 'evade or avoid' withdrawal liability payment to the Fund, that liability should be collected without regard to other motivates for the transaction.'

Banner Industries, Inc. v. Central States Pension Fund, 11 E.B.C. at 1180 (emphasis added). That there might have been other motivations for the evasive sale transaction (such as removing the subsidiary's losses from the parent's books or attempting to preserve employees' jobs) does not absolve the parent from liability. *Id.*; *Connors v. B&J Coal Co.*, slip op. at 6-8.

Third, in applying ERISA section 4212(c)'s evade-or-avoid rule, the Arbitrator must look at the seller's purposes at the time the seller entered the transaction, not at what could have or should have happened at a later date."

"Thus, where a failing subsidiary is about to trigger withdrawal liability, transferring away stock in that subsidiary does not fall within ERISA section 4218(1)'s safe haven. The transfer does not meet section 42318(1)'s 'solely because' requirement. For the same reason, if the failing subsidiary's pension contributions continue for some time after a sale as a result of support from its former parent, the sale nevertheless may be treated as having 'caused' a subsequent interruption in employer contributions under ERISA section 4218(1). In other words, a parent corporation cannot postpone its subsidiary's demise by propping up that subsidiary until it is sold, and then later, after the parent's support is withdrawn, claim that the sale did not actually 'cause' the interruption in employer pension contributions within the meaning of ERISA section 4218(1)."

"Overwhelming evidence shows that Santa Fe had 'a principal purpose . . . to evade or avoid [withdrawal] liability' within the meaning of ERISA section 4212 (c). Indeed, one need look no further than the admissions of John J. Schmidt, SFI's president at the time of the transaction and the executive who approved the sale of SFTT's stock.

In his October 18, 1982 memorandum to John Reed (then SFI's chairman) Schmidt admitted that he was

trying to 'buy time against the very probable day when Santa Fe is presented with a UVB liability bill.'

"Santa Fe contends that, to the extent withdrawal liability was a consideration, it was only an incidental 'background thing,' and certainly not 'a principal purpose' of the transaction. It strains credulity, however, to contend that withdrawal liability ranging from $7.5 to $11 million—a sum Mr. Nassimbene described as a 'staggering amount'—was only a 'background thing' to a company with a net worth of only $9 million. Indeed, Santa Fe's own, contemporaneous analyses of SFTT list withdrawal liability to this Fund as the single largest liability facing the carrier."

"Nevertheless, the evidence in this case establishes beyond any doubt that RSI was a willing participant in Santa Fe's strategy to avoid withdrawal liability. Santa Fe insisted that RSI attempt to prop up SFTT's CBUs through the remainder of 1984. RSI agreed to do so, but only on the conditions that Santa Fe pay $600,000 of the cost for the CBUs and direct the Railroad to help maintain existing employment levels. As Hicks explained, the purpose of these arrangements was clear to both Santa Fe and RSI:

> Again, the reason why was to avoid the partial withdrawal for 1984.

Thus, even under Santa Fe's expansive standard for applying ERISA section 4212(c), Santa Fe is liable."

"Santa Fe thought it could avoid that withdrawal liability by transferring away SFTT's stock in the July 6, 1984 LBO. As shown in Part B above, Santa Fe was wrong. Because Santa Fe had 'a principal purpose . . . to evade or avoid [withdrawal] liability' in entering the July 6, 1984 transaction, that transaction is disregarded under ERISA section 4212(c), and withdrawal liability is determined and collected as if the transaction never occurred.

Santa Fe also is liable to the Fund for a second, and independent reason. Santa Fe is liable for the 70-

percent decline in SFTT's pension contributions because the resulting partial withdrawal was not 'solely because' of a change in corporate form or structure covered by ERISA section 4218(l). Indeed, the July 6, 1984 LBO may be viewed as having hastened or caused the subsequent interruption in employer contributions within the meaning of ERISA section 4218(1), 29 U.S.C. § 1398(l)."

"Although Santa Fe relies heavily upon the fact that the SFTT stock was in the custody of a complete stranger during the waning moments of SFTT's life, the law does not recognize such excuses. The entire last ditch effort to dump the stock of its terminally ill subsidiary, described internally as a 'desperation move' was a transparent effort to 'transfer' (and, therefore, avoid) the impending liability. For that reason, the divestiture must be ignored, in which case, all agree, Santa Fe is liable.

Even had Santa Fe pursued the LBO deal with the purest of intentions and oblivious to the impending withdrawal liability (as it now claims), Santa Fe remains the responsible employer. The statute would, we agree, rescue Santa Fe if the sole reason for asserting the liability was the corporate reorganization. But this is not the case. Liability is asserted because the contribution stream died with SFTT. In fact, the corporate restructuring itself hastened the death by ending the life support of the moribund company. Although Santa Fe now claims that a 46-day strike at a single terminal was the real cause of death, that strike only influenced the time of death.

In perspective, SFTT survived fifty years with, and six months without, Santa Fe. The accumulated deficiencies arising from SFTT's historical pension promises should not, as a matter of fairness, and cannot, as a matter of law, be 'transferred' to the remaining employers in this fund. Santa Fe alone is responsible for its share of the liability."

(C) EXCERPTS FROM THE POST-HEARING REPLY BRIEFS

SANTA FE

"The arbitrator is therefore faced with essentially one global decision: was the hearing testimony genuine and straightforward, or was the hearing itself a 'sham?' If the testimony was true, Santa Fe prevails; if it was false, Central States prevails."

"The live testimony in this case was never contradicted by the documentary evidence. Without exception, Santa Fe's witnesses acknowledged their own documents and embraced them; however, the witnesses also went on to explain their words, and to place them into perspective. The authors did not criticize their own writings and did not deny them. The testimony did not contradict the documents, and the documents did not contradict the testimony."

"The Machiavellian conspiracy alleged by Central States can be summarized in five key factual contentions:

(1) Santa Fe knew that SFTT was doomed as an enterprise;

(2) Santa Fe nevertheless propped up SFTT in order to avoid MPPAA liabilities;

(3) Santa Fe undertook to sell SFTT in a manner designed to avoid MPPAA liabilities;

(4) SFTT inevitably failed after the sale because Santa Fe's artificial propping was terminated; and

(5) Throughout this activity, Santa Fe was motivated by its desire to evade an intimidating MPPAA liability.

In reply, this brief will address each of these five salient points individually in Sections I through V. Each

contention will be shown to be directly contrary to the overwhelming written and oral testimony in this case. Finally, in Section VI we will review the legal authorities cited by Central States and confirm the legal standards set forth in Santa Fe's Post-Hearing Brief."

"As reviewed in Santa Fe's Post-Hearing Brief, the evidence of SFTT's financial condition prior to the sale was cumulative and virtually unrefuted. Witness after witness described the company's operations and its likely success. Over thirty managers of the company were willing to invest in SFTT and were willing to stake their personal savings on their belief that SFTT was viable. Mr. McKee, Mr. Nassimbene, and Mr. Sells, all key SFTT officers who were intimately familiar with the company's operations, gave sworn testimony that SFTT was viable as a stand-alone enterprise. The top officers of Santa Fe, including Mr. Schmidt, concurred in this evaluation."

"In summary, the evidence at the hearing overwhelmingly demonstrated that SFTT was a viable enterprise. Central States' repetitious and strident allegations to the contrary are simply not supported by economic facts in the record."

"Central States reviews the Kearney recommendations but ignores the context of the goal which had been established, i.e. meeting Santa Fe's internal strategic objectives. Apparently, Central States' purpose in dwelling on the Kearney proposals is to infer that Santa Fe could have accepted all of them if only it was willing to pay MPPAA withdrawal liability. Central States concludes that Santa Fe declined to follow the Kearney recommendations because the withdrawal liability 'would consume all of SFTT's value.' This argument is erroneous for two fundamental reasons. First, the Kearney proposals were rejected for sound business reasons which had nothing to do with MPPAA, and, second, all of the contemporaneous analyses showed that SFTT had more than enough 'value' to cover its potential withdrawal liability and have substantial assets left over."

"The Kearney Report showed an expected overall SFTT profit averaging $7 million per year, assuming that the company was maintained as a 'status quo' operation. (Id.) This was hardly a hopeless message of 'doom.'"

"Thus, at the time of the sale, Santa Fe considered SFTT to be viable, and also 'profitable,' but Santa Fe itself didn't 'want to devote its resources to small operations.' As a result, Santa Fe believed that SFTT could perform better in the hands of independent managers: 'in another business or if expanded, [it] can become more profitable.' The question was merely one of priorities; 'the main thing is devotion of resources.'"

"In the present case, however, there was no such 'propping;' in fact, every effort was made by Santa Fe to evaluate SFTT as a separate entity. During the hearing, the general consensus of opinion was that, not only was SFTT not 'propped up,' it was probably harmed overall by the constraints placed upon its ability to compete for customers, to reduce costs, to bargain with unions, and to manage its operations its business independently and effectively."

"The only Central States witness who attempted to support the 'propping' theory was Mr. Gaston. In his testimony, Mr. Gaston identified two forms of 'support' from Santa Fe—a tax allocation agreement and intercompany loans. However, on further examination, even these two 'supports' were shown to be illusory."

"In many other areas, SFTT's affiliation with Santa Fe did much more harm than good. Under Santa Fe ownership, SFTT had an 'extravagant' structure and high costs. It provided the same 'generous' benefits to employees that the other larger and more profitable Santa Fe companies made available to their employees. In 1983 alone, SFTT paid $400,000 in pension and profit-sharing benefits to its nonunion employees.

Management was also a significant problem. There were large numbers of unnecessary middle management employees, and two headquarters.

Mr. McKee explained the corporate '9 to 5' coffee-drinking mentality that prevailed at SFTT because of the lack of meaningful financial incentives. The management at Santa Fe (Mr. Schmidt) had personal difficulties making the necessary management changes that could have made SFTT more profitable.

Perhaps most importantly, SFTT's affiliation with Santa Fe prevented it from marketing aggressively."

"In other words, RSI told Santa Fe that it intended to continue to make the required payments to Central States after the sale in order to comply with MPPAA. Since there is no evidence that RSI intended to evade MPPAA withdrawal liability, as a matter of law, the sale can not be viewed as evasive." *See Dorn's Transportation v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986)."

"Mr. Young, on behalf of Central States, also studied the RSI business plan. The only complaint he had about the plan was that it was 'optimistic.' He did not testify that it was unreasonable or improper in any way. Neither he nor the experts for Central States testified that from their review of the written business plan RSI really intended to liquidate SFTT. This is not surprising because the business plan, when read in its entirety, does not support Central States' new theory that RSI intended to liquidate SFTT. In fact, the business plan discloses RSI's intent to continue and expand LTL operations requiring the existing rolling stock, terminals and employees."

"There is no evidence that the cartage work performed by SFTT for the Santa Fe Railway either artificially 'propped up' SFTT prior to the sale or that the alleged 'prop' was dismantled after the sale. Not one witness testified that cartage had anything to do with the failure of SFTT. Central States has offered no evidence to support any such claim. This insupportable representation occupies a major position of the Central States Brief, and it is a complete fabrication."

"The evidence consistently showed that the acquisition of the BN companies less than two months after the purchase of SFTT was detrimental to SFTT and was a major cause of SFTT's failure. Central States apparently does not disagree with this evidence, but rather suggests for the first time that Mr. Lewensohn purchased the BN companies solely to solve SFTT's MPPAA problems. Not only is Central States' claim without factual basis, it is irrelevant to the issue of whether Santa Fe sold SFTT to evade withdrawal liability."

"The illegal strike by the Chicago Teamsters commenced on December 3, 1984 and had an undeniable and significant adverse impact on the operations and cash flow of SFTT."

"Did Santa Fe come to understand that the liquidation of SFTT would likely trigger contingent withdrawal liability? Yes. Did Santa Fe attempt to conduct its business affairs to minimize the chance that SFTT would fall below the 30% benchmark established by MPPAA (conduct even Mr. Levy of Central States stated was appropriate)? Of course it did. Did Santa Fe conduct studies of SFTT prior to making the decision to sell the company? Again, yes. Did Santa Fe consider liquidating SFTT in the event it was unable to find a ready, willing and able buyer? Yes again. Does any of this prove that Santa Fe's principal or overriding purpose was to sell SFTT to evade or avoid withdrawal liability? Absolutely not! Competent and honest management of any business would have conducted its affairs in the same way."

Central States ignores the undisputed evidence that SFTT was evaluated and sold in the ordinary course of Santa Fe business.

"Central States has apparently gone through the massive volume of paper generated by this study and culled out every reference to MPPAA for use in its Brief. This exercise is noteworthy for only two reasons. First, Central States has attempted to link the MPPAA references together in a manner which might imply an unstated

sinister purpose, and second, despite this attempt to manipulate the record, there is nothing in the quoted material which evidences any intent by Santa Fe to evade or avoid withdrawal liability."

"Central States repeatedly misrepresents SFTT's contingent withdrawal liabilities as if they were larger than life, sufficient to 'consume all of SFTT's net worth, if not more.' This is apparently done to support its claim that virtually all of Santa Fe's conduct can be explained by its 'overriding' concern with this potentially 'staggering' liability.

The truth is, however, the expected post-tax value of any withdrawal liability, when discounted to present value, was $2.9 million at most, and was further subject to 50% discounting due to pending court challenges to the constitutionality of the MPPAA statute."

"According to Central States, §§1392(c) and 1398(1) are 'independent bases for enforcing liability.' Section 1392(c) supposedly establishes liability on the basis of a subjective test ('principal purpose to evade or avoid'), even if objective causation of the withdrawal is not proven. Section 1398(1) supposedly imposes liability on the basis of an objective (i.e., causation of an 'interruption in employer contributions'), even if a subjective intent is not proven. Central States, as we will demonstrate, is simply incorrect in postulating their alternative theories of recovery.

In support of this two-pronged test, Central States cites the same three decisions that it relied on exclusively in its Preliminary Statement and which we discussed at length in our Post-Hearing Brief: the vacated *Banner* arbitration decision (*Banner Industries v. Central States*, 11 E.B.C. 1149 (1989) (Graham, Arb.), op. withdrawn, *dism'd* 12 E.B.C. 1992 (1990), *Wisconsin Steel (In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 681 F. Supp. 512 (N.D.Ill. 1988))."

"Even if he applied his erroneous and unprecedented legal standard, *Banner's* Arbitrator Graham probably would have had difficulty finding that evasion or avoidance of withdrawal liability was 'one of the motivating factors' in the sale of SFTT. The 'record of events' in Santa Fe's case is wholly different from *Banner*. There was no ESOP or 'Compensation Plan' created especially to dispose of SFTT. Rather, SFTT was divested in the ordinary course of business in the same manner as numerous other Santa Fe subsidiaries."

"In our opening brief, we analyzed the *Wisconsin Steel* decision and demonstrated at length that it lends no support to Central States' legal theory in this dispute. First, the decision does not address any of the sections of MPPAA at issue here. It relates solely to those sections of ERISA which govern single employer pension plans. For that reason above, it has no relevance here.

Second, the passage from the case which is cited by both Central States and the *Banner* arbitrator had nothing to do with the ultimate decision in the case. The judge simply fashioned a judicial remedy to allow a theory of recovery which did not exist under the literal terms of the applicable statute, 29 U.S.C. §1362."

"The Connors decision was based on a flagrant sham transaction."

"Central States argues for an extremely low standard of proof under §1392(c). First, Central State contends that the 'principal purpose' language mandates nothing more than proof only that MPPAA avoidance is 'one of the motivating factors.' Second, Central States contends that 'evade or avoid' does not require proof of a motive to deceive, or to commit a 'sham.' In support of these propositions, Central States again cites nothing more than the three irrelevant opinions discussed in the preceding section."

"Central States, of course, is aware of the uniform body of case law that has concluded that §1392 is designed

to prevent sham, rather than bona fide transactions. If a transaction or change in corporate structure is 'not a sham' and is 'accomplished without incurring contemporaneous withdrawal liability, then withdrawal liability cannot be assessed' against the selling corporation upon the failure of the successor. *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 698 F. Supp. 698, 703 (W.D.Mich. 1987), *aff'd*, 857 F.2d 1107 (6th Cir. 1988)."

"Because of the nature of the alleged conspiracy and the nature of the testimony at the hearing, the question facing this arbitrator can be essentially reduced to a single issue: did Santa Fe engage in 'sham' behavior? If the transaction was motivated by the principal purpose to evade or avoid MPPAA, then all the sworn testimony at the hearing likewise must have been motivated by the desire to conceal that purpose, and thus Santa Fe has now been engaged in illicit efforts to evade MPPAA liabilities for at least 8 years. On the other hand, if the testimony at the hearing was credible, then MPPAA was not the principal force driving the sale of SFTT, and Santa Fe must prevail."

"Central States' claim that §1398 provides a 'separate and independent basis for enforcing liability' is pure fiction. There is no legal or factual support for this assertion.

In the only case where this claim has been asserted by a pension fund, the court soundly rejected it. *Teamsters Pension Trust Fund v. Central Michigan Trucking*, 698 F. Supp. 698 (W.D. Mich. 1987), aff'd, 857 F. 2d 1107 (6th Cir. 1988)."

"In the final analysis there is no credible evidence that the sale of SFTT caused any cessation of contributions to Central States. Contributions continued for Teamster work in the Central States area through at least July, 1985. Section 1398 cannot be the basis of any separate assessment of withdrawal liability against Santa Fe."

"The requirements of law and the facts do not appear to matter to Central States in its quest for an alternative pocket from which to replenish its mismanaged funds. But Congress did not intend such an arbitrary and unjust result. Instead, it carefully crafted into MPPAA a test which requires a pension fund, such as Central States, to first prove that a challenged transaction was a sham entered into for a principal purpose of evading withdrawal liability. Having admitted that the sale of SFTT was arms-length and bona fide, i.e., not a sham, and further that there were many purposes for the sale besides MPPAA avoidance. Central States cannot and has not proved its case.

Perhaps recognizing its failure, Central States attempts to assert a pure 'objective test' of recovery under §1398 of MPPAA. But this approach was soundly rejected in *Central Michigan, supra*. Moreover, there is simply no credible support for Central States' claim that the sale of SFTT caused cessation of contributions to Central States. SFTT was viable prior to and after its sale as confirmed by the weight of all the evidence. A Central States expert even admitted that he could not have foreseen the failure of SFTT at the time it was sold and refused to opine that the sale of SFTT caused its failure. In short, this alternate theory of recovery must also fail, because like the others it too is without legal or factual basis.

In the end, having failed to prove that the principal purpose of Santa Fe's decision to sell SFTT was to evade withdrawal liability, Central States cannot prevail. There was no sinister plot, no grand gamble, no sham sale and no overriding purpose to sell SFTT, at all costs, to avoid a contingent withdrawal liability. The sale of SFTT cannot be disregarded and Central States can not, therefore, recover withdrawal liability from Santa Fe.

Central States

"This case presents two questions about the motive and manner in which Santa Fe Industries disposed of Santa Fe Trail Transportation Company ('SFTT' or 'Trails') through the leveraged buyout ('LBO') with Rail Services, Inc. ('RSI'). First, did Santa Fe Industries enter the LBO with a principal purpose to evade or avoid withdrawal liability? Second, did the LBO so weaken SFTT that it caused an interruption in employer contributions under the Central States, Southeast and Southwest Areas Pension Fund ('Central States' or the 'Fund')? As shown in the Fund's Post-Hearing Brief, the answer to both questions is yes. Therefore, Santa Fe Pacific Corporation ('Santa Fe') remains an employer subject to withdrawal liability pursuant to sections 4212(c) and 4218(1) of the Employee Retirement Income Security Act of 1974 ('ERISA'), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ('MPPAA'), 29 U.S.C. §§ 1392(c), 1398(1) (1988)."

"Significantly, this is not a case where the Arbitrator must rely solely upon circumstantial evidence or inference to determine the answer to either question. Santa Fe's intent to avoid withdrawal liability is laid out in a series of documents authored by the company's senior executives, business research staff, expert consultants and attorneys between 1981 and 1984. Indeed, the company's own documents confirm that Santa Fe devised two strategies to avoid withdrawal liability."

"Unable to find a suitable purchaser, Santa Fe next considered

> 'desperation moves'
> leverage buyout to employees
> selling it to someone in trouble

Santa Fe finally struck a leveraged deal with RSI, a small, thinly-capitalized freight consolidator that proved itself incapable of keeping SFTT afloat for more than six

months. In sum, given Santa Fe's own voluminous record of events, there is no need to speculate about Santa Fe's intent or purpose in entering the LBO: Santa Fe wanted to avoid paying withdrawal liability, and it said so—repeatedly—at the time."

"All did not go as planned. RSI could not liquidate SFTT's assets quickly enough. SFTT's more than one-half million dollar per-month operating losses quickly consumed all of SFTT's cash and most of SFTT's dwindling net worth. SFTT stopped making pension contributions to this Fund in December 1984, and went out of business altogether only months later.

In the end, Santa Fe blames others for the fact that its strategy for avoiding withdrawal liability failed. This arbitration, however, concerns Santa Fe's own conduct in disposing of SFTT, not the conduct of others and not speculation about what could have happened."

"ERISA section 4221(a)(3)(A) establishes a mandatory presumption in favor of a pension plan's withdrawal liability determination. It provides:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

29 U.S.C. § 1401(a)(3)(A).

Santa Fe argues that this presumption no longer applies. Santa Fe reasons that, by presenting evidence at the arbitration hearing, it overcame the presumption in the Fund's favor.

Santa Fe misreads the statute. The presumption in section 4221(a)(3)(A) of ERISA does two things. First, it assigns to the employer a burden of going forward in the arbitration. In other words, the employer must come

forward with evidence supporting its case, or the employer loses automatically. Second, it assigns a standard of proof for the employer's evidence. The employer must prove 'by a preponderance of the evidence' that the Fund's assessment was 'unreasonable or clearly erroneous.' In short, the employer must not only present some evidence, the employer must present evidence that is strong enough to show that the Fund acted unreasonably or in a clearly erroneous fashion. If the arbitrator finds that the evidence is in equipoise, the pension plan wins."

The Fund has consistently stated that Santa Fe remains subject to withdrawal liability as a result of ERISA sections 4212(c) and 4218(1), 29 U.S.C. §§ 1392(c), 1398(1). The Fund has consistently explained to Santa Fe and to this Tribunal that sections 4212(c) and 4218(l) establish separate and independent bases for upholding the Fund's assessment against Santa Fe. Santa Fe should recognize this fact by reading the parties' stipulation of the initial issues for arbitration in this case (Santa Fe Ex. 236) or any of the following documents filed in this proceeding:

* The Fund's October 17, 1988 decision on review (Fund Ex. 178)

* Fund's Preliminary Statement (served on January 22, 1991)

* Post-Hearing Brief of the Fund (served on July 12, 1991)

Thus, if the Arbitrator finds in favor of the Fund under either or both of those sections, Santa Fe is responsible for withdrawal liability."

A. Santa Fe's Attempt To Rewrite ERISA Section 4212(c) Is Without Merit.

Section 4212(c) of ERISA states that:

If a principal purpose of any transaction is to evade or avoid [withdrawal] liability under this part, this part shall be applied (and liability shall

> be determined and collected) without regard to such transaction.

29 U.S.C. § 1392(c). Thus, if Santa Fe entered the LBO transaction with 'a principal purpose . . . to evade or avoid [withdrawal] liability,' withdrawal liability shall be determined and collected from Santa Fe without regard to the LBO transaction.

Recognizing that its own documents establish liability under the plain meaning of this statutory provision, Santa Fe attempts to rewrite the law. Santa Fe now claims that ERISA section 4212 applies only when the transaction is a 'sham' or 'fraud.' This argument fails."

"ERISA section 4218(1) shields from withdrawal liability only those routine corporate transformations that do not accompany an employer withdrawal in fact. Santa Fe, however, views ERISA section 4218(1) as a sword that allowed it to escape responsibility by masking its partial withdrawal with a stock transfer. In doing so, Santa Fe proposes a reading of ERISA section 4218(1) that would allow any employer on the verge of withdrawal to escape liability by jettisoning the stock of its failing subsidiary. This reading ignores the plain meaning and purpose of ERISA section 4218(1)."

"ERISA Section 4218(1) establishes a separate and independent basis for upholding the fund's assessment in this case."

"The proper inquiry under ERISA section 4212(c) is how Santa Fe went about disposing of its unprofitable and obsolete subsidiary. On this, the record is abundantly clear. Santa Fe pursued a strategy to first 'defer' withdrawal liability by artificially propping up SFTT's CBUs, and then to 'transfer' the liability to someone else willing to take it."

"The fact that Santa Fe negotiated its strategy for avoiding withdrawal liability with RSI does not excuse Santa Fe's conduct."

"As a factual matter, Santa Fe's negotiations with RSI were not marked by uniform good faith."

"Long before this case arose, Santa Fe's senior management and expert consultant on the trucking industry concluded that SFTT was, among other things, a 'perennial loser' in the common carrier business, 'noncompetitive' 'among the living dead' and 'not viable.' For purposes of this arbitration, however, Santa Fe attempts to repackage SFTT as a viable company that was sold in the ordinary course of business. As shown below, this attempt to rewrite history is belied by Santa Fe's own written records and by the hard financial and operating facts about SFTT."

"Santa Fe argues that SFTT could have survived as a 'break-even' operation after the LBO because SFTT was close to making its cash inflows from operations equal or exceed its cash outflows from operations. According to Santa Fe,

> [e]ven during its declining year, 1983, the company needed only to reduce its costs or increase its production by 1% in order to make cash inflow equal cash outflow.

This theory, however, relies on an incomplete definition of 'cash flow,' one at odds with the capital requirements of the trucking business and with every cash flow model used by Santa Fe before this litigation began."

"In sum, the cash flow theory now advocated by Santa Fe is incompatible with SFTT remaining an ongoing trucking company after the LBO. At best, Santa Fe's theory shows that SFTT was capable of limping along briefly before collapsing altogether. That, however, was all that Santa Fe required. Santa Fe hoped SFTT would remain in business long enough to place some distance between Santa Fe and withdrawal liability. As Mr. Hicks' notes succinctly explain:

> for our protection - buyer must continue in business for a number of years, however;

otherwise we could be subject to withdrawal liability on the theory that the sale was fraudulent and an attempt to evade MPPAA."

"Santa Fe's attempt to repackage withdrawal liability as merely 'a contingency in the background' is without merit. Santa Fe contends that withdrawal liability under MPPAA 'was no more than a contingency in the background' for it. As shown below, this contention is belied by Santa Fe's own written records and conduct."

"In contrast, Santa Fe perceived the possibility of shedding a substantial withdrawal liability through a sale of SFTT. For this reason, Messrs. Donohoe's and Hicks' contemporaneous notes are replete with references to the possibility of avoiding withdrawal liability through a sale of SFTT. And it is also for this reason that Mr. Schmidt's March 24, 1983 memorandum to Santa Fe's Chairman identifies withdrawal liability—and withdrawal liability only—as a reason for attempting to 'locate a purchaser' of SFTT before 'commencing the close-down' of SFTT."

"Santa Fe's overriding purpose in disposing of SFTT through the LBO was to avoid withdrawal liability.

As shown by the Fund's Post-Hearing Brief, the contemporaneous written record leaves no doubt that withdrawal liability avoidance was Santa Fe's overriding concern in disposing of SFTT through the LBO. In its post-Hearing Brief, Santa Fe posits other reasons for disposing of SFTT through the LBO."

"The Santa Fe Railroad was especially eager to sever its ties with SFTT. Rather than using SFTT's cartage drivers, the Railroad preferred to rely on independent cartage companies in order to save money. The Railroad grudgingly agreed to keep SFTT's remaining cartage contracts in place through December 1984, but only because it was required to help prop up SFTT's CBUs under Santa Fe's strategy for avoiding withdrawal liability. The Railroad had no use for SFTT, and would have preferred to see it dead than to see it survive. As Mr. Cena aptly noted, 'there are obvious risks involved in

perpetuating the use of Santa Fe's identification in ventures that are outside of the Corporation's control.'"

"If responsibility for withdrawal liability had nothing to do with Santa Fe's decision one certainly would have expected Santa Fe to choose liquidation rather than the lower yielding, and more constraining buyout offers. Instead, Santa Fe pursued the RSI buyout proposal because that proposal involved, in Santa Fe's judgment, the best possibility for escaping withdrawal liability."

"Santa Fe's criteria for ranking and selecting potential buyers underscore Santa Fe's desire to avoid withdrawal liability. Santa Fe asserts that many of the ranking and selection criteria used in its search for a buyer had nothing to do with MPPAA. As drafted by Messrs. Donohoe and Hicks, however, the criteria plainly identify MPPAA as a principal consideration."

"The balance of the SFTT/Common Carrier/MPPAA study proved that getting out of the LTL business would trigger withdrawal liability. In short, rumors could make withdrawal liability a certainty for Santa Fe. Avoiding public disclosure, therefore, was consistent with Santa Fe's desire to remove itself from the path of the impending withdrawal liability."

"Santa Fe's attempt to avoid withdrawal liability was not an effort to comply with MPPAA. Throughout this proceeding, Santa Fe has sought to characterize its effort to escape withdrawal liability as an effort to 'comply with MPPAA.' According to Santa Fe, its efforts 'to comply with its [MPPAA's] legal requirements must not be construed as evidence of guilt.'

The contemporaneous written record gives little reason to believe that Santa Fe ever perceived its actions as 'compliance' actions at the time of the LBO. With one possible exception, Santa Fe's own documents fail to mention 'compliance' with MPPAA. Rather, they speak of how to 'avoid' MPPAA penalties, and ask whether 'MPPAA liabilities could be avoided' through a sale."

"Santa Fe reviewed Dun & Bradstreet's credit reports on RSI, and recognized that RSI did not meet any of its five selection criteria. Santa Fe agreed to finance the LBO using SFTT's assets as the only source for the 'purchase' price, and to structure the LBO so that SFTT's stock would be held by a shell corporation isolated from either Santa Fe's or RSI's controlled group. Having first tried but failed to find a safer way to dispose of SFTT, Santa Fe clearly knew the risks of disposing of SFTT's stock through the LBO. In Mr. Hicks' own words, it was a 'desperation' move."

"Santa Fe exaggerates the significance of the final months of SFTT's life."

"At the time Santa Fe closed the LBO, SFTT was losing hundreds of thousands of dollars per month. SFTT's revenues continued their steep decline, and SFTT faced increasing competition from national LTL carriers eager to win over SFTT's remaining customers. SFTT had little chance of surviving, especially after December 1984, when Santa Fe would withdraw the last of its vital supports for SFTT. More important, SFTT's CBUs already had fallen below MPPAA's 30-percent benchmark for the first half of the 1983 through 1985 testing period. As a result, SFTT had even less chance of not triggering a multi-million dollar withdrawal liability under MPPAA.

Ignoring these facts, Santa Fe argues that SFTT triggered withdrawal liability as a result of 'unforeseen events and management decisions which suddenly turned SFTT on a new course after the sale, heading the company toward insolvency in 1985.' As shown below, these events were neither unforeseen nor instrumental to SFTT's inevitable collapse. At best, those events hastened SFTT's collapse by a few months."

(D) PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Santa Fe

"I. PROPOSED FINDINGS OF FACT

Procedural History of the Dispute

1. The Central States, Southeast and Southwest Areas Pension Fund (the 'Fund' or 'Central States') assessed withdrawal liability against Santa Fe Pacific Corporation ('Santa Fe') for a partial withdrawal from the Fund under Title IV of the Employee Retirement Income Security Act of 1974 ('ERISA'), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ('MPPAA'), 29 U.S.C. §§ 1301-1461.

2. On December 15, 1987, Central States issued a Notice and Demand for Payment of Withdrawal Liability to Santa Fe, pursuant to MPPAA. Pursuant to a subsequent agreement with Santa Fe, Central States issued a modified demand on January 22, 1988 assessing withdrawal liability against Santa Fe for the withdrawal of its former subsidiary, the Santa Fe Trail Transportation Company ('SFTT'). Santa Fe responded to the modified demand by requesting Central States to review its assessment of withdrawal liability pursuant to MPPAA §1399. When Santa Fe did not receive a response to its request within the time period provided by MPPAA, it initiated this arbitration in accordance with Section 4221(a) of ERISA, 29 U.S.C. § 1401(a).

Joint Statement of Issues

3. The parties have agreed to a Joint Statement Of Initial Issues For Arbitration (the 'Joint Statement'). Pursuant to the Joint Statement, the parties have agreed that the following issues should be decided in this arbitration:

> Whether pursuant to Section 4218(1)(A) of ERISA, Santa Fe Trail and SFTT, Inc., and their respective contribution histories should be

excluded from consideration in the Fund's determination of whether SFSP has withdrawn and in the Fund's calculation of the allegedly resulting withdrawal liability and whether any transaction involving Santa Fe Trail, SFTT, Inc., and SFSP and its subsidiaries, which would otherwise be embraced by Section 4218(1)(A) must be disregarded pursuant to Section 4212(c)."

"7. On July 6, Santa Fe received full payment for its sale of the SFTT stock. On that date, Santa Fe was paid the purchase price for the stock in two forms. First, Santa Fe received $2,624,000 in cash from RSI. Second, Santa Fe obtained the contractual right to the proceeds, if any, from a contested tax refund case based upon alleged overpayments under the Railroad Retirement Tax Act (i.e., the 'RRTA case'). The amount of $3.4 million was to be refunded to Santa Fe if and when the RRTA case was resolved. The testimony indicated that this amount was eventually received by Santa Fe, and that interest on the refund in the amount of approximately $996,000 was paid to SFTT in May 1985."

"11. Central States based its case primarily on several documents relating to MPPAA and contingent withdrawal liability which were prepared by Santa Fe personnel prior to the sale. These documents, when viewed in the context in which it was written and after consideration of the testimony of authors and recipients, established that Santa Fe was aware of MPPAA and sought expert advice to comply with the many facets of this law."

"23. By the early 1980's, SFTT was not only unnecessary to the Railway, it had become a liability which threatened the Railway's most important business. Mr. Schmidt explained that the Railway historically depended on 'merchandise and manufacturing traffic' which had once moved in boxcars but was shifting more and more to truck. Unlike competing railroads which controlled large volumes of coal and lumber traffic, Santa Fe had very little rail-bound traffic 'that must move on the railroad because of the nature of the traffic.' Therefore,

the Railway was 'highly dependent' on getting 'merchandise and manufacturing traffic' in piggyback hauls. To this end, the Railway worked with freight forwarders to get this traffic, and this became the Railway's 'central theme of traffic development.'"

"37. When the decision was made to divest a company, Mr. Schmidt explained that Santa Fe preferred a stock sale because experience had demonstrated that this produced better value, a simpler transaction, and less disruption to employees."

"46. Santa Fe made the decision to attempt to sell SFTT in March 1983 for a variety of valid business reasons. SFTT was antagonistic to the business on which the Railway depended for its survival. SFTT's earnings fell short of Santa Fe's quantitative goals. Any effort to restructure SFTT would have required bringing in new senior management, and the time and expense of this effort was not considered justified.

"58. SFTT's profit performance was somewhat unpredictable. It lost money in 1980, earned a profit during the recession years of 1981 and 1982, and then incurred losses in 1983 as the company faced divestiture. From a cash standpoint, however, it is undisputed that SFTT earned positive cash flow from its operations every year from 1979 to 1983. Although this financial performance was substandard for the Santa Fee conglomerate, it was not an urgent reason for divestiture. Other reasons were more fundamental. The very nature of SFTT's operation—its competition with third party brokers and forwarders—made SFTT a threat to the business on which Santa Fe's largest company, the Railway, depended."

"65. Santa Fe's efforts to find a buyer after the decision to sell was made in March 1983 were legitimate and bona fide."

"68. Santa Fe hoped to find at least two interested buyers in order to establish a market price through the free bidding process. In the end, there were two competitive

offers. RSI expressed interest in SFTT in October, 1983, and a group of SFTT employees led by Mr. Larry Mckee, SFTT's chief financial officer ('McKee Group') began to bid in November, 1983. After extensive due diligence, full disclosure, and months of negotiations, RSI won the bidding with a superior offer. The McKee Group's competing offer was close in value and thus tending to confirm that a free market price had been set for SFTT."

"104. Based on my review of all of the evidence, I find that the sale of SFTT was bona fide and arm's length, and Central States did not seek to prove otherwise. Mr. Ed Young, the initial investigator for Central States, denied he ever investigated the bona fide or arm's length nature of the sale. Later, Dr. Glaskowsky testified for Central States that he had 'no knowledge' of any improper intent or lack of good faith in the sale. Dr. Glaskowsky testified that the sale was 'bona fide' in the Webster's sense of 'done or made in good faith, sincere, authentic, genuine,' and that 'it [the SFTT sale] was a transaction that met those tests.' (Id.) Dr. Glaskowsky also defined the term 'arm's length' and stated that the SFTT met that criteria also.

105. David Gaston, Central States' other expert, did not challenge the non-collusive nature of the transaction.

106. Based on my review of all the evidence, I also find that Santa Fe and RSI did not have any agreement or conspiracy to evade or avoid any withdrawal liability or other obligation imposed by MPPAA. The sale of SFTT was not fraudulent. Nor was the sale a sham or pretext."

"107. After a careful review of all the evidence, I find that SFTT was viable from an economic and financial standpoint prior to and after its sale.

108. The fact witnesses testified that they believed that SFTT would survive after sale, and indeed intended that the company would succeed as a profitable enterprise."

"124. SFTT has been a profitable enterprise through the end of 1982, immediately before the decision was made to sell the company. In the depth of a recession that hurt all trucking companies, SFTT made money in 1981 and 1982, and had retained earnings of approximately $6 million at the end of 1983."

125. While the trucking industry generally declined in 1981 and 1982, SFTT's revenue yield almost doubled during this time period. SFTT had eliminated many unprofitable terminals and was picking up new high paying freight from the remaining terminals. During 1981-82 and again in 1982-83, SFTT's LTL business was actually increasing while the business of the rest of the industry generally was not."

126. SFTT's SPECOM division was consistently profitable and generated cash flow for SFTT throughout this time period."

"150. SFTT failed because of post-sale developments which were not caused by the sale of SFTT. Some of these post-sale developments were orchestrated by the new owners of SFTT. Some of the developments were out of their control. None were caused by Santa Fe."

"154. The acquisition of the BN companies had a substantial and immediate adverse impact on SFTT. The assets of SFTT were pledged to Interfinancial to enable the new owners of SFTT to acquire the BN companies. The BN companies were insolvent prior to their sale with SFTT and were losing money at a rapid rate."

"161. Illegal and unanticipated labor union strikes caused significant damage to SFTT revenue and operations. On December 3, 1984, Teamsters Local 710 began illegally picketing SFTT's Chicago terminal." The strike was precipitated by the merger of BN companies and SFTT operations in Chicago." In December, 1984, the Teamsters shut down SFTT's main Chicago terminal. Revenues rapidly evaporated as shippers learned of the strike. Revenue lost from December 3, 1984 to

January 14, 1985 was a result of the strike was estimated to be approximately $1,305,000."

"II. PROPOSED CONCLUSIONS OF LAW

1. Section 1401 of MPPAA presumes that a pension fund's determinations are correct, but provides that the presumption can be rebutted. Santa Fe has shown by a preponderance of the evidence that Central States' determination was unreasonable and clearly erroneous."

"6. The evidence does not support a finding that the SFTT sale was entered into as a sham or a fraudulent transaction. On the contrary, the evidence demonstrated that the transaction was entered into after negotiations between two uncoerced and unrelated parties. I conclude that the sale of SFTT was arms-length and bona fide.

7. The evidence in this case, when viewed as a whole, demonstrates that SFTT was sold for a variety of legitimate business reasons. Evasion or avoidance of potential liability under MPPAA was not a principal purpose for Santa Fe's decision to sell SFTT in March, 1983, nor was it the reason why Santa Fe ultimately sold SFTT to RSI in July, 1984. I find that Santa Fe was not sold for a principal purpose of evading or avoiding potential withdrawal liability to Central States within the meaning of 29 U.S.C. §1392)c) [ERISA §4212(c)].

8. 29 U.S.C. §1398 [ERISA §4218] allows corporate stock sales, without triggering withdrawal liability, provided there is no cessation in contributions resulting from the sale. After Santa Fe sold its stock, SFTT continued to be responsible for contributions to Central States. At the time of the sale there was no interruption in SFTT's contributions to Central States. SFTT first missed payments to Central States in December 1984. This interruption was not caused by the sale of SFTT. Rather, the numerous post-sale events which I have described caused the interruption in payments.

9. I find that pursuant to Section 1398(1) (A) of MPPAA [4218(1)(A), SFTT and SFTT, Inc. and their

respective contribution histories should be excluded from consideration in the Fund's determination of whether Santa Fe has withdrawn and in the Fund's calculation of the allegedly resulting withdrawal liability.

10. I also find that no transaction involving SFTT, SFTT, Inc. and Santa Fe and its subsidiaries, which would otherwise be embraced by Section 1398(1)(A) [4218(l)(A)], must be disregarded pursuant to Section 1392(c) [4212(c)].

11. Santa Fe has proven, by a preponderance of all of the evidence, that Central States' assessment against Santa Fe was unreasonable and clearly erroneous.

12. Central States shall refund to Santa Fe all interim payments made by Santa Fe prior to the date of this Award (the overpayments), together with interest, in accordance with 29 C.F.R. §2641.7(a)(2) and §2644.2(d).

13. This is a final decision with respect to the determination submitted for arbitration within the meaning of 29 U.S.C. §1401(d) and in accordance with this determination, Santa Fe is not required to make any further interim payments to Central States."

Central States

"2. Santa Fe and the Fund agreed to bifurcate this arbitration proceeding. Specifically, they have requested that the Arbitrator first decide whether Santa Fe is responsible for a statutory withdrawal from the Fund under MPPAA. They further agreed that, if Santa Fe is found responsible, Santa Fe thereafter may arbitrate the amount of its withdrawal liability, as requested in its arbitration demand.

3. This Interim Award addresses the threshold issue of whether Santa Fe is responsible for withdrawal liability under the Fund. Simply put, that issue considers whether Santa Fe was a statutory 'employer' responsible for withdrawal liability and, if so, whether Santa Fe ceased to be the responsible employer as a result of its disposition of its trucking subsidiary, Santa Fe Trail Transportation

Company ('SFTT' or 'Trails'), in a highly leveraged buyout ('LBO'). In deciding this issue, the Arbitrator considered first whether, in ridding itself of SFTT's stock through the LBO, Santa Fe Industries had 'a principal purpose . . . to evade or avoid (withdrawal) liability' so that the stock transfer must be disregarded under ERISA section 4212(c), 29 U.S.C. § 1392(c). A second question was whether, even if the stock transfer is given effect, Santa Fe is liable to the Fund because the LBO transaction caused SFTT's collapse and the resulting interruption in employer contributions to the Fund. If so, ERISA section 4218(1), 29 U.S.C. § 1398(1), would not insulate Santa Fe from responsibility for the withdrawal liability.

4. If the answer to either of the two foregoing questions is 'yes,' Santa Fe is responsible for withdrawal liability. As explained below, the Arbitrator finds and concludes that the answer to both questions is an unqualified 'yes.' Accordingly, the Arbitrator upholds the Fund's determination that Santa Fe is responsible for withdrawal liability under the Fund. Pursuant to the parties' agreement, Santa Fe may now arbitrate before me its defenses (if any) to the Fund's determination of the amount of Santa Fe's withdrawal liability. The parties are directed to contact the AAA within thirty (30) days of the date of this award to schedule a status conference to discuss generally how the parties wish to proceed with the arbitration of those issues."

"21. Similarly, deregulation eliminated AT&SF's need to rely on SFTT for providing prior and subsequent haul service to AT&SF's customers. Myriad new rail-truck piggyback plans developed under deregulation, and Santa Fe no longer needed to provide 'door-to-door' service for AT&SF's shipping customers. Indeed, AT&SF came to rely on third-party freight brokers (also referred to as shipper's agents or freight consolidators) to assemble freight and bring it to AT&SF's piggyback yards."

"34. Confronted with SFTT's poor financial performance, and with SFTT's equally poor prospects

under deregulation, SFI sought outside expert advice on SFTT and the trucking industry. In June 1981, SFI hired the consulting firm A.T. Kearney, Inc. ('A.T. Kearney') to study SFTT and to recommend strategies for improving SFTT's financial performance. A.T. Kearney is a well-known and respected consultant on the transportation industry.

35. After three months of study, however, A.T. Kearney found that SFTT's condition was even worse than initially anticipated. In a September 4, 1981 status report, A.T. Kearney explained:

> At the time of that [June 1981] proposal, we believed that there would be certain things which could be done to fix the current SFTT operation (i.e., beef-up areas of management, improve terminal productivity, add new equipment, etc.). However, the conclusions drawn from our Phase I analysis indicate that Santa Fe Trail is not viable as a trucking company in its current form. In addition, modifying the current company does not appear to be a viable solution to the problem of SFTT because of the magnitude of the changes which are required with respect to the management and operations."

"43. Following his review of the Kearney Report, Mr. Schmidt initiated what he described as 'an additional in-house study of exiting LTL.' On May 21, 1982, Schmidt met with his vice president, Thomas J. Fitzgerald, and SFTT's president, Mr. Nassimbene, to plan the study."

"54. Next, Mr. Jorgenson eliminated his assumption that, under a status quo operation, SFTT would not trigger a withdrawal liability. Mr. Jorgenson now 'assum[d] a kind of inevitability about the incurrence of pension liabilities.' Specifically, he 'assumed that the management took no steps whatsoever to manage a potential liability associated with the business.' Under this new assumption, SFTT would become responsible for

amortizing withdrawal liability in payments of $2.022 million annually, beginning in 1985. As a result, the option of discontinuing common carrier operations altogether became even more attractive than before. Mr. Jorgenson found that, measured in terms of present values to Santa Fe Industries, discontinuing SFTT's common carrier operations would cost $2.553 million, but that continuing the status quo would cost $6.337 million."

"65. Mr. Schmidt decided, however, that he would do Mr. Throckmorton one better; instead of simply shutting down SFTT and paying withdrawal liability, Mr. Schmidt would try to avoid the withdrawal liability by selling SFTT. Mr. Schmidt explained his reasoning in a March 24, 1983 memorandum to Mr. John Reed, then chairman of SFI."

> "In view of the continued deterioration of this operation and a lack of a viable plan for making the company profitable, I believe the entire operation should be closed down in stages. However, before commencing the close-down, I will make an effort to locate a purchaser for the company. If a purchaser can be located, there is a good possibility of transfer[r]ing part or all of a rather substantial liability which the company is incurring under the Multiemployer Pension plan Amendments Act (MPPAA)."

"68. To effectuate its plan to evade or avoid withdrawal liability, SFI directed its General Counsel for Corporate Affairs, Mr. Donohoe, to direct and lead a team of SFI staff in preparing and negotiating a sale. In addition, SFI engaged A.T. Kearney to help identify candidate companies for a possible sale, and to assist in the 'packaging' of positive attributes of SFTT. Mr. Schmidt instructed the team that the disposition was to 'be given high priority and handled as expeditiously as possible due to the continuing losses being sustained by SFTT.'"

"78. Donohoe and Hicks targeted October 1983 as a 'decision month,' and suggested that if their efforts to sell SFTT as an ongoing business failed, SFI should simply 'shut down' SFTT. In the meantime, Hicks made two important observations. First, if SFI did shut SFTT down, SFTT's liquidation would trigger an estimated withdrawal liability of at least $9 million. Fund Ex. 115 at I030300. Second, if SFI did find someone else interested in buying SFTT, that buyer must continue in business for some time after the sale; otherwise claims for that withdrawal liability could be asserted against SFI."

"103. In sum, Santa Fe recognized that it faced a risk of withdrawal liability—or at least litigation over such liability—under each of the three buyout proposals. The RSI proposal, however, would enable Santa Fe to pocket an immediate $6 million that it otherwise might have to pay over to the Fund or to SFTT's other creditors. The risk that Santa Fe might have to 'fight' to keep that money was well worth it from Santa Fe's perspective. At most, Santa Fe would be required to pay back that which it had already taken."

"104. On April 2, 1984, Mr. Donohoe recommended that SFI sell SFTT's stock to RSI. SFI agreed, and its Board of Directors formally approved the sale two weeks later."

"111. Significantly, however, RSI's business plan for SFTT called for liquidating most of SFTT's operating assets, and using the proceeds to expand RSI's brokerage operations.

112. Lewensohn perceived SFTT to be a financially troubled, but asset rich company. In fact, Lewensohn concluded that the market value of SFTT's assets exceeded the book value of those assets by several million dollars. Lewensohn also perceived that, as a signatory to the Teamster's National Master Freight Agreement, SFTT was saddled with 'the highest labor costs among all competitors.'"

"119. Consistent with RSI's written business plan, SFI negotiated with RSI a strategy for avoiding withdrawal liability. Mr. Donohoe testified that SFI 'wanted the buyer to continue in business . . . it was important that the buyer continue in business so that there wouldn't be a withdrawal . . .'"

"129. RSI planned to borrow the entire cash portion of the purchase price, using SFTT's assets as collateral. In effect, SFTT would borrow its own purchase price, and RSI would contribute no cash to the acquisition. To facilitate this financing plan, SFI agreed that the stock of SFTT would be transferred to a newly-formed holding company rather than to RSI."

"142. Lewensohn closed the BNT acquisition on September 1, 1984. Announcing that he had 'solved the problem for Santa Fe,' Lewensohn immediately told SFI that he no longer would furnish SFI with monthly CBU reports as required under section 8.06 of their sales agreement. SFI did not object.

143. Soon, however, SFTT ran out of cash. In December 1984, SFTT stopped making contributions to the Central States Pension Fund altogether. According to Lewensohn, '[w]e just couldn't pay into Central States anymore. We didn't have the money.' That same month, efforts to merge seniority rosters for SFTT's and BNT's clerical staff in Chicago precipitated a strike by the combined 14-person staff. Picketing by the clerical staff halted operations at SFTT's Chicago terminal for 46 days."

"147. In June 1985, SFTT's creditors—including its unpaid workers—petitioned to have SFTT adjudged a bankrupt and liquidated. Nothing SFTT's new owners did, or failed to do, could have saved SFTT from collapse."

"Santa Fe remains subject to withdrawal liability as a result of ERISA Section 4212(c) because SFI had a principal purpose to evade or avoid withdrawal liability."

"154. That SFI had a principal purpose to avoid withdrawal liability also was made clear by the circumstantial evidence surrounding the LBO. Virtually every action taken by Santa Fe in its effort to rid itself of SFTT was guided by the overriding purpose of avoiding withdrawal liability."

"Santa Fe's contention, moreover, asks the Arbitrator to ignore the copious record Santa Fe wrote between 1982 and 1984 about its efforts to escape withdrawal liability. That record cannot be ignored. Nor can it be explained away by Santa Fe's after-the-fact rationalizations developed in the course of this litigation. As courts and other arbitrators have recognized, a person's contemporaneous written statement generally is the more reliable, probative evidence of that person's intent."

"Santa Fe remains subject to withdrawal liability for the alternative reason that its July 6, 1984 disposition of SFTT caused an interruption in employer contributions under the fund within the meaning of ERISA section 4218(l)."

"167. Most important of all, however, the Santa Fe group supported SFTT's efforts to stay above MPPAA's 30% benchmark. Santa Fe's efforts to ensure that SFTT retained cartage work for AT&SF were instrumental in lifting SFTT's CBUs above the benchmark for 1982. But for Santa Fe's efforts, SFTT would have fallen below MPPAA's 30% benchmark beginning in 1982 rather than 1983. Thus, SFTT would have triggered partial withdrawal liability under this Fund one year sooner than it did—at a time when Santa Fe had not yet shed all of its shares of SFTT stock."

"171. The Arbitrator finds and concludes that Santa Fe is liable for a partial withdrawal from the Fund on two alternative grounds. First, because the July 6, 1984 LBO had 'a principal purpose . . . to evade or avoid' withdrawal liability, the LBO is disregarded under ERISA section 4212 (c), and Santa Fe remains a responsible employer. Second, regardless of Santa Fe's purpose in entering the LBO, the LBO did not satisfy the

requirements for an exception from liability under ERISA section 4218(1). The partial withdrawal was not 'solely because' of the disposal of SFTT through the LBO, and, by hastening SFTT's demise, the LBO 'caused' an interruption in employer contributions under the Fund.

172. Santa Fe urged the Arbitrator not to apply the arbitral presumption set forth in ERISA section 4221)a)(3), 29 U.S.C. § 1401(a)(3)(A), or to find that presumption unconstitutional. The Arbitrator's findings and conclusions however, would not be different, even if the Fund enjoyed no presumption of correctness in its favor under the statute."

(C) DISCUSSION

The Arbitrator believes it is worth noting the following excerpt from Central States' original brief which outlines the scope of this arbitration.

"This brief addresses the threshold issue of whether Santa Fe is responsible for withdrawal liability under the Fund. Simply put, that issue requires the Arbitrator to decide whether Santa Fe was a statutory 'employer' responsible for withdrawal liability and, if so, whether Santa Fe ceased to be the responsible employer as a result of its disposition of its trucking subsidiary, Santa Fe Trail Transportation Company ('SFTT' or 'Trails') in a highly leveraged buyout ('LBO'). In deciding this threshold issue, it is necessary first to determine whether, in ridding itself of SFTT's stock through the LBO, Santa Fe Industries had 'a principal purpose . . . to evade or avoid [withdrawal] liability' so that the stock transfer must be disregarded under ERISA section 4212(c), 29 U.S.C. § 1392(c). Even if the stock transfer is given effect, a second question is whether Santa Fe is liable to the Fund because the LBO transaction, which stripped SFTT of Santa Fe's life-sustaining support, caused SFTT's imminent collapse and the resulting interruption in employer contributions to the Fund. If so, ERISA section 4218(l), 29 U.S.C. § 1398(l), will not insulate Santa Fe from responsibility for the withdrawal liability.

> If the answer to either of those questions is 'yes', then Santa Fe is liable to the Fund for withdrawal liability."

Also referring to the general scope of this arbitration, Santa Fe stated the following in its reply brief:

> "Because of the nature of the alleged conspiracy and the nature of the testimony at the hearing, the question facing this arbitrator can be essentially reduced to a single issue: did Santa Fe engage in 'sham' behavior? If the transaction was motivated by the principal purpose to evade or avoid MPPAA, then all the sworn testimony at the hearing likewise must have been motivated by the desire to conceal that purpose, and thus Santa Fe has now been engaged in illicit efforts to evade MPPAA liabilities for at least 8 years. On the other hand, if the testimony at the hearing was credible, then MPPAA was not the principal force driving the sale of SFTT, and Santa Fe must prevail."

Needless to say, the parties covered numerous factors related to this issue. And within each factor there were many sub-factors that were thoroughly covered. The Arbitrator does not believe it is necessary to repeat every point made by the parties in this extensive case.

The history of this case is long and the Arbitrator studied each step of the way from the beginning to the end. It was conceivable that an action taken at one point in the history of this case could have been modified by an action taken later in the history of the case.

It is the Arbitrator's finding that Santa Fe made its decision to sell SFTT for legitimate reasons and not to evade or avoid withdrawal liability. A careful study of the transcripts of this case, along with all of the written evidence, indicates that the concept of synergy was an important factor in the original decision to sell SFTT. Of course, there were other reasons. But the nature of SFTT's business was at cross-purposes with the goals of Santa Fe. In evaluating SFTT's "strategic fit" within Santa Fe, the conclusion was reached that for reasons concerning maximizing the return on their investment, as well as the various reasons related

to synergy; that SFTT did not meet Santa Fe's goals or expectations.

Central States claims that the original reason for the sale of SFTT was for entirely different reasons.

In its original brief, Central States wrote the following:

> "1. Santa Fe knew that SFTT was a 'perennial loser' in the common carrier industry, and could 'not compete' in the post-1980, deregulated industry. Indeed, as a railroad-affiliated 'pocket' trucker, SFTT was counted by Santa Fe as being 'among the living dead.'
>
> 2. Santa Fe knew that the decline in SFTT's business and pension plan contribution base units ('CBUs') threatened to trigger withdrawal liability of more than $11 million, including more than $7.5 million to this Fund alone."

The record does not indicate that "Santa Fe knew that SFTT was a 'perennial loser.' In fact Santa Fe felt that SFTT was a viable business and could very well do better if it were not part of Santa Fe. There is no question that Santa Fe was aware of MPPAA regulations and obligations during the period in question. But the Arbitrator finds that this was just one of many considerations in the over-all decision making process to sell SFTT. Santa Fe had legitimate business purposes to sell SFTT and it was not a sham to evade or avoid MPPAA.

The parties are aware that the financial data involved in this case is enormous. The decision to sell SFTT was made in March 1983. The record indicates that for a couple of years prior to that point SFTT was profitable and there was no sound way to predict whether SFTT would or would not lose money in the future.

One of the problems in evaluating the first phase of this case is the references by Santa Fe to MPPAA which had just become effective. In evaluating these references in the written record (as well as in testimony) the Arbitrator reviewed the entire evaluation process conducted by Santa Fe. It is the Arbitrator's finding that although MPPAA was studied and the withdrawal

liability was analyzed, it is the Arbitrator's finding that Santa Fe decided to sell SFTT for legitimate business reasons.

In its original brief, Santa Fe stated the following:

> "In this case, the record uniformly indicates that MPPAA was not singled-out as a special concern; rather, it was tested and analyzed just like every other potential cost involved in the transaction. In the liquidation scenario, it was inescapable that the termination of SFTT's operations would precipitate withdrawal liability, and consequently every liquidation estimate projected that cost. However, when estimates were prepared of the cost involved in a stock sale of SFTT, no MPPAA liabilities were projected, based upon Santa Fe's legal understanding that 'upon the sale of SFTT stock, no complete or partial withdrawal liability would be incurred by SFI.'"

In his extensive deliberations in the first part of this case, the Arbitrator arrived at the same conclusion.

In referring to the written record of this case, Central States wrote the following in its original brief:

> "That written record leaves no doubt that: (A) Santa Fe clearly understood that SFTT was not a viable motor carrier and, therefore, needed to be eliminated; (B) in deciding how to rid itself of SFTT, Santa Fe Industries' overriding purpose was to avoid the withdrawal liability that would be triggered upon SFTT's liquidation or inevitable collapse; and (C) stripped of Santa Fe's support, SFTT was doomed to collapse little more than six months after the LBO closed."

However, the Arbitrator was most impressed by the testimony of those witnesses who were previously employees of SFTT. These employees wanted to purchase SFTT. If anyone knew of all the intricate details of operating SFTT on a short-term as well as long term basis—it was these employees and there is nothing in the record that they wanted to commit financial suicide. SFTT was viable as far as they were concerned and the Arbitrator agrees with them. There was a question if Santa Fe "propped up" SFTT in order to avoid MPPAA liabilities and that Santa Fe knew

that SFTT had to fail. But, once more, the Arbitrator carefully reviewed the testimony of Mr. Mckee. He knew that SFTT was a viable company and in fact was looking forward to operating SFTT away from the influences of Santa Fe. McKee was aware that SFTT's affiliation with Santa Fe did more harm than good in many fundamental areas of the business.

The decision to sell SFTT was made for numerous legitimate business reasons and not for the purpose of evading or avoiding withdrawal liability.

The second phase of this case concerns the seeking of a buyer and the actual sale of SFTT.

In its original brief Central States wrote the following:

> "6. Before closing SFTT and paying withdrawal liability, Santa Fe decided it would first attempt to avoid that liability by transferring away SFTT. Santa Fe Industries' president stated that he would 'make an effort to locate a purchaser for the company. If a purchaser can be located, there is a good possibility of transferring [sic] part or all of a rather substantial liability which the company is incurring under the Multiemployer Pension Plan Amendments Act (MPPAA).'
>
> 7. In attempting to locate a purchaser, Santa Fe first looked for a 'large, financially strong purchaser.' Santa Fe reasoned that 'for our protection—buyer must continue in business for a number of years, however; otherwise we could be subject to the withdrawal liability on the theory that our sale was fraudulent and an attempt to evade MPPAA.'
>
> 8. Unable to find a financially-responsible entity to buy the foundering trucker, Santa Fe opted to dispose of SFTT's stock on a highly-leveraged basis by transferring the stock of a corporate shell established by a small, thinly-capitalized freight consolidator."

In its Proposed Findings Of Fact And Conclusions Of Law Santa Fe wrote the following:

> "68. Santa Fe hoped to find at least two interested buyers in order to establish a market price through the free bidding process. In the end, there were two competitive offers. RSI expressed interest in SFTT in October, 1983, and a group of SFTT employees led by Mr. Larry McKee, SFTT's chief financial officer ('McKee Group') began to bid in November, 1983. After extensive due diligence, full disclosure, and months of negotiations, RSI won the bidding with a superior offer. The McKee Group's competing offer was close in value and thus tending to confirm that a free market price had been set for SFTT."

Although it is true that RSI did not meet the original standards that Santa Fe established for the sale of SFTT, the Arbitrator found no credible evidence or testimony that there was a plot or conspiracy between Santa Fe and RSI to avoid or evade withdrawal liability. The Arbitrator's investigation leads him to the conclusion that the sale of SFTT to RSI was a bona fide and arm's length transaction.

RSI viewed SFTT as a viable operation and, of course, this was consistent with the thinking of Mr. Larry McKee and other responsible individuals within SFTT.

In its post-hearing brief Central States made the following points:

> "What viability SFTT did have resulted from the support provided by Santa Fe and its other affiliates. As a member of the Santa Fe family, for example, SFTT enjoyed easy access to loans and credit. When Santa Fe disposed of SFTT in the July 6, 1984 transaction, SFTT lost this vital support, and became even less viable than before."

> "Desperate to remove itself from the path of that liability, Santa Fe engineered the LBO as a device for ridding itself of SFTT's stock. Santa Fe now claims that the LBO insulated it from any responsibility for its proportionate share of the UVB costs attributable (in part) to SFTT's historical participation in the Fund."

> "Nevertheless, the evidence in this case establishes beyond any doubt that RSI was a willing participant in Santa Fe's strategy to avoid withdrawal liability. Santa Fe insisted that RSI attempt to prop up SFTT's CBUs through the remainder of 1984. RSI agreed to do so, but only on the conditions that Santa Fe pay $600,000 of the cost for the CBUs and direct the Railroad to help maintain existing employment levels. As Hicks explained, the purpose of these arrangements was clear to both Santa Fe and RSI:
>
> > Again, the reason why was to avoid the partial withdrawal for 1984."

The Arbitrator disagrees with Central States' contention that whatever "viability SFTT did have resulted from the support provided by Santa Fe and its other affiliates." The testimony of most of the witnesses indicates that SFTT was a viable company. As stated earlier, if anything, Santa Fe was doing more harm to SFTT from acquiring customers to adding extra costs to SFTT.

In reviewing all of the testimony and evidence regarding RSI's role in purchasing SFTT, the Arbitrator did not find any collusion on the part of RSI with Santa Fe. The record indicates that RSI had a good knowledge of SFTT and there was a bona fide transaction between itself and Santa Fe. RSI was not involved in any "strategy to avoid liability." In fact, the credible evidence in this case indicates that the sale of SFTT was not a sham to evade or avoid withdrawal liability. Nor does the Arbitrator believe that somehow RSI was duped into purchasing SFTT. The representatives of RSI were knowledgeable and concluded a bona fide sale. RSI was aware of the MPPAA obligations and its business plan clearly indicated that it intended to stay in business for some time. A witness characterized the business plan as "optimistic." This may have been so. But it was a sound plan that made sense and there was no reason on the date of the sale that SFTT could not succeed as a profitable operation.

The Arbitrator also spent a good deal of time studying the leveraged buyout (LBO) involved in this case. In its Proposed Findings Of Fact And Conclusions Of Law, Central States wrote the following:

> "129. RSI planned to borrow the entire cash portion of the purchase price, using SFTT's assets as collateral. In effect, SFTT would borrow its own purchase price, and RSI would contribute no cash to the acquisition. To facilitate this financing plan, SFI agreed that the stock of SFTT would be transferred to a newly-formed holding company rather than to RSI."

Needless to say, there are many interpretations that either side can place on any given event involved in this case. However, the Arbitrator has reviewed the LBO and finds no evidence that this indicated that somehow there was a conspiracy between Santa Fe and RSI to avoid or evade MPPAA obligations. This method of financing was not uncommon during that period.

In its reply brief, Santa Fe stated the following:

> "In the end, having failed to prove that the principal purpose of Santa Fe's decision to sell SFTT was to evade withdrawal liability, Central States cannot prevail. There was no sinister plot, no grand gable, no sham sale and no overriding purpose to sell SFTT, at all costs, to avoid a contingent withdrawal liability."

The Arbitrator has reviewed this case more than once to uncover any sinister plot or conspiracy or sham sale in order to avoid a contingent withdrawal liability. However, in all of his studies he found that no conspiracy existed. It is true that some selected statements could raise some doubts. But the events in this case took place over a long period of time. And the Arbitrator finds that the thread that runs throughout the fabric of this case is that Santa Fe was involved in a bona fide and arms-length situation in which it wanted to sell SFTT for legitimate reasons and not for the purpose of avoiding a contingent withdrawal liability.

The third phase of this case concerns the claim that the sale of SFTT caused the failure of SFTT and the resulting withdrawal liability.

In its post-hearing brief, Santa Fe stated the following regarding this issue:

> "The sale of SFTT cannot be said to have 'caused' its failure if, at sale, the company had valuable assets and

a capacity to succeed. In other words, if SFTT was viable when sold, the unfortunate fact that the new owners failed to manage the company effectively should not be ascribed to the sale itself. The evidence in this case showed that SFTT was indeed viable before and after the sale, as shown by the competing bids and by the testimony of the numerous participants to the transaction.

The evidence also showed the true reasons for the failure of SFTT, including the purchase of the insolvent BN companies and their merger with SFTT, the transfer of SFTT assets including its SpeCom division, the disastrous illegal strike in December, 1984, the failure of Teamster renegotiations, departure from the business plan, and expensive non-essential expenditures. All of these factors caused SFTT's failure."

Santa Fe also wrote the following in its post-hearing brief:

"However, Central States has provided no evidence that the sale itself caused the bankruptcy. Instead, the evidence shows that numerous developments after the sale caused SFTT to fail, thereby triggering the withdrawal liability. Some of these developments were orchestrated by the new owners of SFTT. Some of the developments were out of their control. In any event, the post-sale developments were unforeseeable by—and beyond the control of—Santa Fe."

"RSI's Purchase of the BN Companies was a Major Cause of SFTT's Failure."

"On December 3, 1984, Teamsters Local 710 began illegally picketing SFTT's Chicago terminal. The strike was precipitated by the merger of the BN companies with SFTT."

"RSI had anticipated that the unions would be more accommodating to SFTT once it emerged from its large conglomerate ownership and became a more independent carrier. RSI expected that the unions would provide the same terms as being given to SFTT's

competitors. The unions' failure to live up to this expectation cost the company business."

In its post-hearing brief, Central States wrote the following:

"9. As predicted by Santa Fe and A.T. Kearney, SFTT's common carrier operations continued to generate losses of hundreds of thousands of dollars per month. In December 1984, the Santa Fe Railroad opened SFTT's lucrative cartage contracts to outside bidding, thereby withdrawing its vital support of the one profitable sector of SFTT's business. Out of cash, SFTT stopped making pension contributions to this Fund in December 1984, and soon collapsed altogether."

"As the summaries demonstrate, SFTT was not a viable motor carrier. Even before deregulation, SFTT's operating ratios were dangerously high. Indeed, they were no different from the average operating ratios of those carriers that ultimately failed following deregulation. As a rail-affiliated trucker, moreover, SFTT lacked the route structure and terminal network needed to compete in the deregulated industry. Compounding this, SFTT's trucks, tractors, and trailers were old and deteriorating quickly. The costs needed to replace SFTT's worn equipment alone would be substantial, and were certainly beyond the reach of SFTT's new owners after the July 6, 1984 transaction."

In response to one of the statements indicated above, Santa Fe wrote the following in its reply brief:

"There is no evidence that the cartage work performed by SFTT for the Santa Fe Railway either artificially 'propped up' SFTT prior to the sale or that the alleged 'prop' was dismantled after the sale. Not one witness testified that cartage had anything to do with the failure of SFTT. Central States has offered no evidence to support any such claim. This insupportable representation occupies a major position of the Central States Brief, and it is a complete fabrication."

In its reply brief, Central States made the following points:

> "Santa Fe exaggerates the significance of the final months of SFTT's life."
>
> "At the time Santa Fe closed the LBO, SFTT was losing hundreds of thousands of dollars per month. SFTT's revenues continued their steep decline, and SFTT faced increasing competition from national LTL carriers eager to win over SFTT's remaining customers. SFTT had little chance of surviving, especially after December 1984, when Santa Fe would withdraw the last of its vital supports for SFTT. More important, SFTT's CBUs already had fallen below MPPAA's 30 percent benchmark for the first half of the 1983 through 1985 testing period. As a result, SFTT had even less chance of not triggering a multi-million dollar withdrawal liability under MPPAA.
>
> Ignoring these facts, Santa Fe argues that SFTT triggered withdrawal liability as a result of 'unforeseen events and management decisions which suddenly turned SFTT on a new course after the sale, heading the company toward insolvency in 1985.' As shown below, these events were neither unforeseen nor instrumental to SFTT's inevitable collapse. At best, those events hastened SFTT's collapse by a few months."

Once more the Arbitrator is faced with the question if in fact SFTT was a viable company on the date it was sold to RSI. After long and difficult study the Arbitrator has concluded that it was a viable company. Then what happened? Less than two months after the purchase of SFTT, RSI purchased the BN companies. This caused a good deal of confusion and upheaval within SFTT and RSI. The Arbitrator believes that this was a major error and had a terrible impact on SFTT. A detailed analysis of the transcript of this case indicates how severe an impact the purchase of the BN companies had on SFTT. This was unforeseen at the time of the sale.

Of course the purchase of the BN companies was bad enough on its own, but the IBT Local 710 strike that began on 12/3/84 didn't help matters. Although not as severe as the

purchase of the BN companies, it was one more negative factor that threw the company in disarray.

The Arbitrator has reviewed Central States' claim regarding the cartage work and finds that this had nothing to do with the failure of SFTT.

The key employees of SFTT thought that SFTT was a viable company when purchased by RSI. So does the Arbitrator. However, no one could predict such a serious mistake as the purchase of the BN companies less than two months from the purchase of SFTT. The purchase was terrible and the timing couldn't be worse. It led to the failure of SFTT. The sale of SFTT by Santa Fe did not cause its failure.

AWARD

The Arbitrator finds in favor of Santa Fe's position. The Arbitrator rules that the fourteen points on pages 51, 52, 53 and 54 of Santa Fe's Proposed Conclusions Of Law is his award in this case.

ROBERT L. MITRANI, Arbitrator
January 1, 1992

II. PROPOSED CONCLUSIONS OF LAW

1. Section 1401 of MPPAA presumes that a pension fund's determinations are correct, but provides that the presumption can be rebutted. Santa Fe has shown by a preponderance of the evidence that Central States' determination was unreasonable and clearly erroneous.

2. I found Santa Fe's witnesses to be reasonable and credible. The testimony of the fact witnesses did not seek to disavow contemporaneous documentation. The authors, and frequently the recipients of documents, discussed the meaning and the intent of the writings. The facts of the SFTT divestiture were reviewed at the hearing and specific documents, especially those having ambiguous or potentially misleading language, were analyzed in detail. This procedure allowed me to understand the documents and place them into perspective, rather than taking isolated passages out of context.

3. When the sale of SFTT is viewed in the context of Santa Fe's business as it was conducted at the time, potential withdrawal liability under MPPAA was appropriately analyzed in Santa Fe's strategic deliberations.

4. I find that SFTT was viable from a financial and economic standpoint prior to and after its sale. I further find, based on a preponderance of the evidence, that Santa Fe could not have foreseen and did not foresee the failure of SFTT at the time it was sold.

5. I find that SFTT solvent prior to and after it was sold, and that SFTT had adequate capital prior to and after it was sold.

6. The evidence does not support a finding that the SFTT sale was entered into as a sham or a fraudulent transaction. On the contrary, the evidence demonstrated that the transaction was entered into after negotiations between two uncoerced and unrelated parties. I conclude that the sale of SFTT was arms-length and bona fide.

7. The evidence in this case, when viewed as a whole, demonstrates that SFTT was sold for a variety of legitimate business reasons. Evasion or avoidance of potential liability under

MPPAA was not a principal purpose for Santa Fe's decision to sell SFTT in March, 1983, nor was it the reason why Santa Fe ultimately sold SFTT to RSI in July, 1984. I find that Santa Fe was not sold for a principal purpose of evading or avoiding potential withdrawal liability to Central States within the meaning of 29 U.S.C. §1392(c) [ERISA §4212(c)].

8. 29 U.S.C. §1398 [ERISA §4218] allows corporate stock sales, without triggering withdrawal liability, provided there is no cessation in contributions resulting from the sale. After Santa Fe sold its stock, SFTT continued to be responsible for contributions to Central States. At the time of the sale there was no interruption in SFTT's contributions to Central States. SFTT first missed payments to Central States in December 1984. This interruption was not caused by the sale of SFTT. Rather, the numerous post-sale events which I have described caused the interruption in payments.

9. I find that pursuant to Section 1398(1)(A) of MPPAA [4218(1)(A)], SFTT and SFTT, Inc. and their respective contribution histories should be excluded from consideration in the Fund's determination of whether Santa Fe has withdrawn and in the Fund's calculation of the allegedly resulting withdrawal liability.

10. I also find that no transaction involving SFTT, SFTT, Inc. and Santa Fe and its subsidiaries, which would otherwise be embraced by Section 1398(1)(A) [4218(1)(A)], must be disregarded pursuant to Section 1392(c) [4212(c)].

11. Santa Fe has proven, by a preponderance of all of the evidence, that Central States' assessment against Santa Fe was unreasonable and clearly erroneous.

12. Central States shall refund to Santa Fe all interim payments made by Santa Fe prior to the date of this Award (the overpayments), together with interest, in accordance with 29 C.F.R. §2641.7(a)(2) and §2644.2(d).

13. This is a final decision with respect to the determination submitted for arbitration within the meaning of 29 U.S.C §1401(d) and in accordance with this determination, Santa

Fe is not required to make any further interim payments to Central States.

14. Central States and Santa Fe shall each pay their own costs and attorneys' fees. The arbitration fees and the arbitrator's fees are assessed and shall be paid equally by Santa Fe and Central States.

Respectfully submitted,

SANTA FE PACIFIC CORPORATION

By:_____
One of Its Attorneys

David C. Gustman
Harry L. DeLung, Jr.
Weston W. Marsh
FREEBORN & PETERS
11 South LaSalle Street
Suite 1500
Chicago, Illinois 60603
(312) 750-9500

Dated: November 8, 1991

Supreme Court
OCT 12 1994
OFFICE OF THE CLERK

No. 94-449

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SANTA FE PACIFIC CORPORATION,
Petitioner,
v.
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
JAMES P. CONDON
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
9377 West Higgins Road
P.O. Box 5123
Rosemont, Illinois 60018-5123
(708) 518-9800
Attorneys for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Until 1984 Petitioner Santa Fe Pacific Corporation ("Santa Fe") owned Santa Fe Trails Transportation Company ("SFTT"). SFTT was a failing enterprise that Santa Fe wanted to get rid of. Among Santa Fe's concerns was an imminent withdrawal liability to Respondent Central States, Southeast and Southwest Areas Pension Fund ("Central States") under 29 U.S.C. § 1382 occasioned by the decline of SFTT. Santa Fe sought to pass this liability (estimated by Santa Fe to be as high as $11 million) along by selling the stock of SFTT. SFTT went bankrupt in 1985 thereby triggering the withdrawal liability. Central States assessed Santa Fe for $7.6 million.

The question presented is whether the Seventh Circuit correctly held that a stock sale transaction that otherwise might escape withdrawal liability under 29 U.S.C. § 1398, nonetheless subjects the seller to withdrawal liability under 29 U.S.C. § 1392(c) when a principal purpose of the stock sale was to evade or avoid withdrawal liability.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
STATEMENT OF CASE	1
REASONS FOR DENYING THE WRIT	4
I. THE CORPORATE CHANGE PROVISION OF ERISA (§ 1398) DOES NOT OVERRIDE THE EVADE OR AVOID PROVISION (§ 1392(c))	4
II. THE DECISION BELOW ACCORDS WITH THE DECISIONS OF THE OTHER CIRCUITS AND CONFLICTS WITH NONE	9
III. THIS COURT SHOULD NOT CONSIDER THE SWEEPING RULE SOUGHT BY PETITIONER WHERE THE DECISION BELOW TURNS ON A UNIQUE SET OF FACTS AND AFFECTS ONLY A FEW TRANSACTIONS OF QUESTIONABLE MERIT	12
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page
Banner Industries and Central States Pension Fund, 11 Employee Benefits Cases (BNA) 1149 (Am. Arb. Assn., January 22, 1988)	14
Central States Pension Fund v. Cullum Companies, Inc., 973 F.2d 1333 (7th Cir. 1992)	7
Concrete Pipe and Products v. Construction Laborers Pension Trust, —— U.S. ——, 113 S.Ct. 2264 (1993)	1
Cuyamaca Meats, Inc. v. Pension Trust Fund, 827 F.2d 491 (9th Cir. 1987)	11
Dorn's Transportation v. Teamsters Pension Trust Fund, 787 F.2d 897 (3rd Cir. 1986)	9
Pension Benefit Guaranty Corp. v. Ouimet, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 101 S.Ct. 1356 (1981)	3
Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984)	4
Santa Fe Pacific Corp. v. Central States Pension Fund, 22 F.3d 725 (7th Cir. 1994)	2
Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc., 857 F.2d 1107 (6th Cir. 1988)	10
Vaughn v. Sexton, 975 F.2d 498 (8th Cir. 1992)	3

STATUTES

29 U.S.C. § 1301(a)(3)	1
29 U.S.C. § 1301(b)(1)	3, 5
29 U.S.C. § 1369(b)	2
29 U.S.C. § 1381	4
29 U.S.C. § 1382	i
29 U.S.C. § 1384	7, 8
29 U.S.C. § 1384(a)(1)	7
29 U.S.C. § 1385(a)(1)	13
29 U.S.C. § 1392(c)	*passim*
29 U.S.C. § 1398	*passim*
29 U.S.C. § 1401	3

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page
PBGC Opinion Letter 82-4 (February 10, 1982)	2
PBGC Opinion Letter 84-7 (December 20, 1984)	8
PBGC Opinion Letter 85-15 (May 31, 1985)	8
PBGC Opinion Letter 92-1 (March 30, 1992)	8
126 Cong. Rec. 23038 (1980)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-449

SANTA FE PACIFIC CORPORATION,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF CASE

Respondent Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan within the meaning of Section 4001(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1301(a)(3). In 1980 Congress amended ERISA with the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). In MPPAA Congress provided that employers who contribute to multiemployer plans are liable for withdrawal liability if they cease to have an obligation to contribute (withdraw). *See Concrete Pipe and Products v. Construction Laborers Pension Trust*, —— U.S. ——, 113 S.Ct. 2264 (1993).

Santa Fe Trails Transportation Company ("SFTT") was a subsidiary of Petitioner Santa Fe Pacific Corpora-

tion ("Santa Fe"). SFTT contributed to Central States pursuant to a series of collective bargaining agreements. In 1984 Santa Fe sold the stock of SFTT in a leveraged buyout. *Santa Fe*, Pet. App. at 2a.[1] The operations of SFTT had already declined to a point where withdrawal liability was imminent. *Santa Fe*, Pet. App. at 4a. Santa Fe feared that it could be liable for up to $11 million if SFTT completely shut down. *Santa Fe*, Pet. App. at 5a. Santa Fe believed that if it could locate a purchaser for SFTT, it could transfer this liability and considered "desperation moves," including "selling it to someone in trouble." *Santa Fe*, Pet. App. at 5a. "The situation, in short, was that by selling the stock rather than the assets of the subsidiary Santa Fe stood to avoid millions of dollars in withdrawal liability, whereas without that potential liability the sale of the assets would have brought a higher price." *Santa Fe*, Pet. App. at 6a. Shortly after the sale of SFTT, the company went bankrupt and ceased all contributions to Central States in 1985.

The reason Santa Fe thought it could pass this withdrawal liability on to a stock purchaser is ERISA Section 4218(1), 29 U.S.C. § 1398(1).[2] That provision applies to changes in corporate structure described in § 1369(b), and it provides that no withdrawal occurs "solely" because of such a change. While the statute does not expressly apply to stock sales, the Pension Benefit Guaranty Corporation ("PBGC") has interpreted it to apply to stock sales. *See* PBGC Opinion Letter 82-4 (February 10, 1982) (Respondent's Appendix at 1a).

Central States nonetheless assessed Santa Fe for $7.5 million in withdrawal liability. In Central States' view,

---

[1] This case summary is based on the opinion below, *Santa Fe Pacific Corp. v. Central States Pension Fund*, 22 F.3d 725 (7th Cir. 1994), contained in the Appendix to the Petition at pp. 1a-8a. The opinion below will be cited herein as "*Santa Fe*, Pet. App. at ——."

[2] We will hereafter refer to ERISA provisions by their codification at 29 U.S.C.

§ 1398 did not apply because Santa Fe had a principal purpose to evade or avoid withdrawal liability in violation of another statutory provision, § 1392(c). That provision permits plans to disregard such a transaction (here the stock sale) and to impose withdrawal liability accordingly. Santa Fe would be liable because under a third statutory provision, § 1301(b)(1), trades or businesses under common control constitute a single employer and thus are jointly and severally liable in the event of a withdrawal. *Vaughn v. Sexton*, 975 F.2d 498, 502 (8th Cir. 1992); *Pension Benefit Guaranty Corp. v. Ouimet*, 630 F.2d 4, 11 (1st Cir. 1980), *cert. denied*, 101 S.Ct. 1356 (1981).

Santa Fe contested the withdrawal liability by initiating arbitration pursuant to § 1401. The arbitrator ruled in favor of Santa Fe and was reversed on appeal to the district court, which remanded the case. The arbitrator again ruled in favor of Santa Fe and was again reversed. The third time the arbitrator ruled in favor of Santa Fe, the district court "with evident reluctance" affirmed. *Santa Fe*, Pet. App. at 2a. Central States then appealed to the United States Court of Appeals for the Seventh Circuit. That court in the decision below reversed the district court. "There can be no serious doubt that withdrawal liability was one of the principal considerations in the decision to sell SFTT." *Santa Fe*, Pet. App. at 3a.

REASONS FOR DENYING THE WRIT

Petitioner, Santa Fe, asks this Court to adopt an interpretation of ERISA that withdrawal liability under 29 U.S.C. § 1381 is foreclosed against the parent of a company where the subsidiary withdraws from a pension plan following the sale of its stock by the former parent. In other words Santa Fe seeks a general "safe harbor" rule based on § 1398 of such breadth that it reaches (and protects) even the dumping of a failing subsidiary whose certain liability would otherwise be Santa Fe's. To reach this conclusion, however, Santa Fe asks the Court to ignore § 1392(c) and thereby upset the balance Congress sought in permitting some transactions to occur without triggering withdrawal liability, but not those with a principal purpose of evading or avoiding liability.

The Court should deny the Petition for three reasons. Santa Fe misreads the statute, which clearly states and intends that §§ 1398 and 1392(c) be applied together in determining whether a seller is yet liable for withdrawal liability of a failed former subsidiary. Serious federal policies are simply not implicated in this process. Second, contrary to Santa Fe's assertions, there is no conflict among the circuits. All circuits agree that § 1392(c) will override a sale of stock exemption of § 1398 in appropriate circumstances, as did the court below. Finally, sales of stock of already failing subsidiaries are rare; and any perceived restrictions on such transactions by subjecting them to § 1392(c) simply does not threaten any important federal policy.

I. THE CORPORATE CHANGE PROVISION OF ERISA (§ 1398) DOES NOT OVERRIDE THE EVADE OR AVOID PROVISION (§ 1392(c)).

Congress enacted MPPAA to ensure that employers do not escape their funding obligations to multiemployer pension plans. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 104 S.Ct. 2709, 2713-2715 (1984). Indeed,

to ensure that employers could not escape by fractionalizing the business, Congress made groups of trades or businesses under common control ("controlled groups") liable as if they were a single employer. 29 U.S.C. § 1301 (b)(1). Controlled group liability, however, creates problems for certain business reorganizations. By altering the form of the controlled group, the employer might cause its own technical withdrawal from a plan even though contributions to that plan continue unabated. For that reason, Congress added 29 U.S.C. § 1398 to MPPAA.

The reason for § 1398 is to ensure that every reorganization or change of corporate form is not automatically a withdrawal because that would interfere unnecessarily with transactions that pose no threat to pension plans. That provision, however, also opens a door to potential problems. If most sales of stock do not threaten plans and are covered by § 1398, what about stock sales that do threaten plans? Congress balanced § 1398 with another provision designed to weed out abusive transactions. Under 29 U.S.C. § 1392(c) any transaction that has "a" principal purpose to evade or avoid withdrawal liability may be disregarded by the plan. Thus a sale of stock that is intended to evade or avoid withdrawal liability may be disregarded and the seller remains liable for withdrawal liability.

Santa Fe would turn this logic around. To Santa Fe every sale that meets the requirements of § 1398 would be absolutely exempt from withdrawal liability. To Santa Fe the decision of a parent corporation to sell the stock of a subsidiary may not be examined by a pension plan because in Santa Fe's analysis § 1398 is an absolute safe harbor. If Santa Fe were right, however, then both § 1398(c) and § 1301(b)(1) would lose much (or most) of their force.

Section 1301(b)(1) extends liability under ERISA to corporate parents and other trades or businesses under common control with a former contributor to a pension

plan. As Santa Fe sees it, however, a sale of a contributing subsidiary bars plans absolutely from seeking liability from the former parent if the former subsidiary withdraws. If Santa Fe is right, however, then there is little left of controlled group liability. Under the "Santa Fe rule" a company with a failing subsidiary could essentially give the stock away, passing the potential withdrawal liability on to another. Who would take on such liability? The management of the subsidiary or its employees (through, e.g., an ESOP) have ample incentive to keep their jobs. They might finance the transaction through the former parent by encumbering assets. They have nothing to lose by taking a long shot. But when the withdrawal occurs (as it generally will), the plan faces a contributor with no assets. Under the "Santa Fe rule" the efficacy of controlled group liability would be lost.

In addition Santa Fe's argument would leave little of the evade or avoid statute. Section 1392(c) was drafted with an eye toward corporate manipulations that might compromise a plan's attempts to collect withdrawal liability. The following was stated concerning 29 U.S.C. § 1392(c) during House debates:

> [T]he bill provides that transactions undertaken to evade or avoid withdrawal liability may not be used as a method of escaping withdrawal liability that would otherwise be imposed. It is intended that the plan sponsor, the arbitrator, and the courts follow the substance rather than the form of such transactions in determining, assessing, and collecting withdrawal liability.
>
> Furthermore, we intend that the term "employer" be construed in a manner consistent with the bill and its purposes. We intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form, or control, or through transactions which are less than bona fide and arm's length. Hence, for example, a building and construction industry employer—or for that matter any employer

> contributing to a plan—will not be able to evade withdrawal liability by going out of business and resuming business under a different identity.

126 Cong. Rec. 23038 (1980) (statement of Rep. Frank Thompson). It is apparent from this statement that Congress was considering both § 1398 and §1392(c) together and that the latter complemented the former.

The relationship between § 1392(c) and other "safe harbor" provisions of MPPAA has also been explored by the courts to similar effect. Section 1384 exempts the seller in certain asset sales from withdrawal liability. The Seventh Circuit has recently held that once the parties to an asset sale meet the initial criteria for application of § 1384, then there is no liability for the seller except when § 1392(c) might apply. *Central States Pension Fund v. Cullum Industries, Inc.*, 973 F.2d 1333 (7th Cir. 1992). In responding to the argument that application of § 1384 to a sale should be limited to transactions that accord with general statutory purpose, the court noted that Congress provided express protections to plans, including § 1392(c).

> The pension plans and employees are protected, but the safeguards appear in other subsections of section 1384 and the MPPAA. For example, the section 1384 exemption applies only to a "bona fide, arm's-length sale of assets to an unrelated party." 29 U.S.C. § 1384(a)(1). Similarly, 29 U.S.C. § 1392(c) provides that "[i]f a principal purpose of any transaction is to evade or avoid liability," the withdrawal liability provisions of the MPPAA "shall be applied (and liability shall be determined and collected) without regard to such transaction." These two provisions ensure that businesses cannot avoid withdrawal liability through sham transactions.

Id. at 1340.[3]

---

[3] The Court's use of the term "sham transactions" should not be taken literally. The court was not suggesting a standard, but only

Nonetheless Santa Fe urges this Court to adopt a rule that would exempt all sales from threat of seller withdrawal liability as long as they meet minimum statutory requirements of § 1398 and regardless of purpose.[4] Such a rule would leave plans helpless against corporate manipulations—even those that defeat statutory purpose. But Congress did not rest on statutory purpose, nor does Cenral States. Congress provided § 1392(c) as precisely the kind of backstop to statutory purpose that is necessary to balance a statutory exception to withdrawal liability.

Santa Fe argues that the Pension Benefit Guaranty Corp. ("PBGC") has issued an opinion letter supporting an absolute exemption for stock sales. That is simply not correct. In Opinion Letter 85-15 (May 31, 1985) PBGC noted only that "if a division of a corporation is first incorporated and then sold, the transaction does not *automatically* violate [§ 1392(c)]." (Respondent's Appendix at 7a.) Similarly the letter held that "the application of [§ 1384] to a sales transaction does not *by itself* violate [§ 1392(c)]." (Emphasis added.) *See also* PBGC Opinion Letters 84-7 (December 20, 1984) and 92-1 (March 30, 1992).[5] (Respondent's Appendix at 4a and 9a respectively.) Plainly PBGC understood that neither § 1398 nor § 1384 provide absolute exemptions from withdrawal liability and that these transactions would be measured against the evade or avoid statute, § 1392(c).

---

an example. As the decision below held, "a principal purpose" is plainly a broader standard than "sham transaction."

[4] In the court below Santa Fe urged that § 1392(c) only apply to stock sales that were sham transactions. In the petition Santa Fe now urges an absolute exemption for stock sales.

[5] In each of these opinion letters PBGC took care to remind the public that § 1392(c) would apply to a sales transaction. Moreover, in Opinion Letter 92-1 PBGC noted that § 1398 might not fully relieve a seller of liability even in the absence of § 1392(c) . PBGC thus provides no support for Santa Fe's argument for an absolute exemption.

II. THE DECISION BELOW ACCORDS WITH THE DECISIONS OF THE OTHER CIRCUITS AND CONFLICTS WITH NONE.

Petitioner argues that the decision below conflicts with decisions in three other circuits. Apparently Petitioner has forgotten the question it presents to the Court since each circuit to consider the issue has arrived at the same conclusion in accord with the decision below. Petitioner asks whether a company may be held liable under § 1392(c) for withdrawal liability because it structured the sale of a subsidiary to take advantage of § 1398. As we show, no circuit has ruled that § 1392(c) can not apply to such transactions. To the contrary, each circuit has assumed that § 1392(c) can apply, and the circuits are in accord.

Petitioner's first case is the Third Circuit's decision in *Dorn's Transportation v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3rd Cir. 1986). In that case Dorn's was sold to Oneida after which Oneida went bankrupt. The pension plan sought withdrawal liability from the seller on several theories including that the sale constituted an attempt to evade or avoid withdrawal liability in violation of § 1392(c).

Rejecting the plan's other arguments, the Third Circuit then considered the application of § 1392(c) to the sales transaction. "Surely, § 1392 was designed to guard against the intentional evasion of liability." *Id.* at 902. The court then applied § 1392(c) to the sales transactions employing the standard of whether "a principal purpose of the transaction as a whole [the stock sale] is to escape liability." *Id.* This is essentially the same standard used by the Seventh Circuit in the case below: whether a principal purpose of Santa Fe's decision to sell the stock of SFTT was to escape liability. In *Santa Fe* the seller was held liable while in *Dorn's* it was not. This difference in outcome, however, did not result from a conflict between the courts on the applicable law since they both agreed § 1392(c) could apply. It was the different facts of the two cases

that led one to find § 1392(c) violated while the other found it not violated.[6]

In Santa Fe's view the choice to bring a sale of business under § 1398 forecloses any inquiry into whether a principal purpose of that choice was to evade or avoid withdrawal liability. The Third Circuit did not adopt that view in *Dorn's*, but rather examined that choice to determine whether § 1392(c) was violated. This is exactly what the Seventh Circuit did in *Santa Fe*. Accordingly there is no conflict between these circuits on the question presented in the Petition.

Next Petitioner argues that there is a conflict between the court below and the Sixth Circuit in *Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988). But the Sixth Circuit did not even address the § 1392(c) issue since it was not appealed to it. Petitioner states, however, that like the district court the Sixth Circuit "held that the Fund's § 1392(c) claim should be decided by an arbitrator." Pet. at 18. In fact the district court had remanded that question to arbitration. 698 F.Supp. 698 (W.D. Mich. 1987). Implicit in that remand is the court's conclusion that § 1392(c) should be applied to the sales transaction in that case.[7]

---

[6] Actually the Third Circuit erred in applying the "a principal purpose" standard of § 1392(c). The Third Circuit believed that both seller and purchaser must share the purpose to evading or avoiding withdrawal liability—that a principal purpose of evade or avoid withdrawal liability by the seller alone is not enough to violate § 1392(c). Thus, while there is no conflict with the Seventh Circuit on whether § 1392(c) applies, the two circuits differ in its application in practice. Petitioner has not raised the latter question, however.

[7] As Petitioner notes, the district court stated that § 1392(c) would apply in the event that the sales transaction was a sham. Pet. at 18. Thus the *Central Michigan* courts, like the Seventh Circuit, agree that § 1392(c) applies even where the employer invokes § 1398. The circuits might disagree on whether the standard was "sham," but that is not the question presented in the

Apparently the Sixth Circuit agreed. But if § 1392(c) may be applied to the employer's decision to transfer stock in a subsidiary, as these courts allow, then there is no conflict between the Sixth and Seventh Circuits either.

Finally, and weakest of all, Petitioner cites *Cuyamaca Meats, Inc. v. Pension Trust Fund,* 827 F.2d 491 (9th Cir. 1987) for the proposition that there is a conflict between the court below and the Ninth Circuit. That case, however, did not even involve a sales transaction. Rather the company determined to continue its contributions to the pension plan as it was entitled to do under law. The company was not subject to § 1392(c) because it was not evading or avoiding withdrawal liability. As long as the company made contributions, there was no withdrawal, and there was no withdrawal liability to evade or avoid.[8] Thus there was no "transaction" to be disregarded under § 1392(c) except the payment of contributions itself. To treat the act of refusing to withdraw as a transaction to evade or avoid withdrawal liability, thus to create a withdrawal, would have made a mockery of this statute whose very purpose was to discourage employer withdrawals by imposing withdrawal liability. No such concern is implicated by applying § 1392(c) to § 1398. Accordingly there is no conflict between these circuits.

Petition. Further the "sham" standard was not actually adopted by these courts and appears to be simply loose language referring to the "evade or avoid" standard of the statute.

[8] There is a similarity to *Santa Fe,* but in that respect the cases are consistent. In both cases the withdrawal took place in the year after the challenged transaction. Central States treated Santa Fe's withdrawal as taking place when SFTT contributions actually ceased (not the previous year when the sale took place) and, pursuant to § 1392(c), treated Santa Fe as if it were still the parent corporation. The Ninth Circuit ruled analogously in *Cuyamaca,* where the withdrawal took place in the year contributions actually ceased (not the year the contract expired) and the liability was calculated and applied accordingly. Now if *Cuyamaca* had taken advantage of this gap in time to divest itself of assets or related companies, then § 1392(c) would apply to that decision.

III. THIS COURT SHOULD NOT CONSIDER THE SWEEPING RULE SOUGHT BY PETITIONER WHERE THE DECISION BELOW TURNS ON A UNIQUE SET OF FACTS AND AFFECTS ONLY A FEW TRANSACTIONS OF QUESTIONABLE MERIT.

Santa Fe argues that this Court should grant a writ of certiorari because the decision below "affects a large number of closed transactions and will affect an even larger number of future transactions." Pet. at 21. Of course, Santa Fe cites no basis for this conclusion, as there is none (probably explaining why this argument appears last in a petition that is otherwise largely a brief on the merits). If history may provide a measure, then this decision affects virtually no "closed transactions" and probably very few future transactions. Hardly a week (or even a day) must go by without some company selling a subsidiary that is one of the tens of thousands of employers that contribute to multiemployer pension plans. Yet for all these transactions only a very few may be found that raise questions concerning withdrawal liability.

The fact of the matter is that most (almost all) stock sales pass muster under § 1398. This is because, unlike Santa Fe's situation with SFTT, most sold subsidies are not already failing businesses (before the sale) that go bankrupt immediately after seller financial subsidiaries are withdrawn and where the purchaser has little or no unencumbered assets to pay withdrawal liability. Most sold subsidiaries are no doubt solvent (or who would buy them). If solvent, they continue to contribute to the pension plan, and there is no withdrawal, no withdrawal liability, and no problem with the decision below, even where the seller is aware of the potential withdrawal liability that is transferred in inchoate form. Santa Fe's type of transaction is quite different—where withdrawal liability is imminent—and is thus actually a narrow exception to the general class of stock sales where § 1392(c) might apply.

Cases like Santa Fe's are cases of desperation. Who buys a failing business? As Santa Fe found out, almost no one; a company is better off shutting down and liquidating assets before it becomes insolvent. But for withdrawal liability, Santa Fe would have liquidated SFTT. Instead it sold SFTT because that was Santa Fe's last hope to avoid withdrawal liability, which was virtually certain to be imposed on Santa Fe in about a year even if Santa Fe kept SFTT running.[9]

This, then, is the profile of a transaction Santa Fe wishes this Court to hold protected under § 1398: a failing subsidiary is sold for less than liquidation value to an almost assetless purchaser in a leveraged buyout for purposes of passing the withdrawal liability from the seller (who keeps the cash) to the purchaser (who acquires the debt). So far there have not been very many of these cases; but if Santa Fe is right, then there is hardly a withdrawal from a pension plan that could not be anticipated in advance and the liability transferred to another through a stock sale. The fact that there are so few reported cases suggests that potential sellers do not view a sale of stock as an opportunity to get rid of withdrawal liability, and do not do so. Santa Fe is the exception that thought it might get away with it. Under the rule sought by Santa Fe there would be many more of these transfers because § 1398 would provide a complete shield from liability that even the evade or avoid statute could not breach. A company facing withdrawal liability would be foolish not to take advantage.

Santa Fe argues that under the Seventh Circuit rule every decision to sell stock of a contributing subsidiary would violate § 1392(c) except where the seller was ignorant of withdrawal liability. This is not true. Every

---

[9] Santa Fe and SFTT had already laid off over 70% of SFTT's employees and were two years into the three-year testing period for a partial withdrawal under 29 U.S.C. § 1385(a)(1) when the sale took place.

seller should be aware of withdrawal liability, but not every subsidiary is on the verge of withdrawal. It is the imminence of the withdrawal, coupled with the decision to divest, that makes "a" principal purpose of the sale to evade or avoid withdrawal liability.[10] Congress provided balance to the statute by permitting the ordinary stock sale while relying on § 1392(c) to catch those cases where withdrawal liability is spun off to a never-never land of noncollection. Employers' awareness of § 1392(c) provides an incentive to avoid risky transactions—a balance Congress certainly was aware of in the drafting. Except for a few cases like Santa Fe's, § 1392(c) has apparently held employers successfully in check, as it was intended, without (as Santa Fe fears) bringing commerce to its knees. This is the balance Santa Fe wishes to upset.

There is, apparently, no problem for this Court to resolve other than Santa Fe's obvious desire not to pay withdrawal liability at the expense of 400,000 participants and beneficiaries of Central States Pension Fund. These cases are rare, as noted, because most companies do not or cannot find a buyer for the stock of a failing subsidiary. In addition these cases are thoroughly fact bound. Santa Fe's arbitration took place over 15 days and involved hundreds of exhibits. The only other case similar to Santa Fe's involved almost as much fact finding. *Banner Industries and Central States Pension Fund,* 11 Employee Benefits Cases (BNA) BC 1149 (Am. Arb. Assn., January 22, 1988). These cases turn on unique sets of facts involving only a narrow class of stock sales. This Court should decline Santa Fe's invitation to adopt a sweeping general

---

[10] Other factors besides imminent withdrawal may, of course, also come into play in defining an attempt to evade or avoid liability. For example, the size of the potential liability compared to the value of the subsidiary may be so disparate that avoidance of liability is driving the transaction. Deep factual inquiries will generally be necessary to sort out the various motivations of the seller in choosing the transaction.

rule to protect a small class of transactions that by themselves lack economic as well as legal merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
JAMES P. CONDON
CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS
PENSION FUND
9377 West Higgins Road
P.O. Box 5123
Rosemont, Illinois 60018-5123
(708) 518-9800
Attorneys for Respondents

October 12, 1994

* Counsel of Record

APPENDIX

BEST AVAILABLE COPY

APPENDIX

[LOGO] 82-4

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006

Feb. 10, 1982

Re: Opinion Letter Regarding Withdrawal Liability Under the Multiemployer Pension Plan Amendments Act of 1980

Dear

We have received your letter in which you asked the Pension Benefit Guaranty Corporation ("PBGC") to rule on several issues arising under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act") as they apply to the transactions described in your letter and certain provisions which you propose to include in the sales agreement between the parties involved in those transactions. (Section references hereinafter are to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as amended by the Act).

It is clear under the Act that the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. Given this scheme for enforcement of the Act, it would be inappropriate for the PBGC to interject itself in such a determination by issuing an opinion on the application of the law to these particular transactions. The PBGC, however, will continue its practice of answering legal questions regarding the Act.

In that regard we point out that the sale by a parent corporation of the stock of a subsidiary corporation presents a question of statutory interpretation that we feel is appropriate to address. The legislative history to the Act contains the following example which indicates that there is no withdrawal liability solely as a result of a sale by a parent of stock of a subsidiary which was obligated to contribute to a multiemployer plan and continues such contributions after the sale:

> "The bill treats an employer as withdrawing from a multiemployer plan when the employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan. A withdrawal does not occur, however, where *an employer ceases to exist merely by reason of a change in form or structure*, as long as the employer is replaced by a successor employer and there is no interruption in the successor employer's contributions to the plan or obligation to contribute under the plan. A group of trades or businesses under common control is treated as a single employer. For example, if P Corporation owns 100 percent of the stock of S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change in ownership of S." 126 Cong. Rec. S10,115 (daily ed. July 29, 1980) and H.R. Rep. No. 96-869, Part II, 96th Cong., 2nd Sess. 162 (1980), reprinted in [1980] U.S. CODE CONG. & AD NEWS 3005-6. (emphasis supplied).

This example is an obvious reference to section 4218 (1)(A) of ERISA which provides that an employer shall not be considered to have withdrawn from a plan solely because the employer ceases to exist by reason of "a change in corporate structure described in section 4062 (d)", as long as no interruption in employer contributions or obligations to contribute under the plan occurs. Thus Congress clearly intended that a sale of stock of a subsidiary corporation is such a change in form or structure and that under section 4218 a withdrawal from a multiemployer plan does not occur when a parent sells the stock of a subsidiary corporation that contributes to a multiemployer plan and such contributions continue after the sale.

If you have any questions or wish to discuss these matters further, please contact Scot McCulloch of this office at (202) 254-4895.

Sincerely,

HENRY ROSE
General Counsel

[LOGO] 84-7

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006

[Dec. 20, 1984]

Dear

We have your letter raising several issues arising under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act").

Your first question concerns whether a withdrawal from a multiemployer pension plan will occur when corporation X organizes a wholly-owned subsidiary corporation Y and transfers to it all of the assets of one of its divisions. Section 4203 of ERISA provides that a withdrawal from a multiemployer plan has occurred when an *employer* permanently ceases to have an obligation to contribute under the plan, or permanently ceases all covered operations under the plan. (Section references herein are to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as amended by the Act). Section 4001(b) defines an "employer" to include all trades or businesses under common control, and the PBGC's regulation on trades or businesses under common control, 29 C.F.R. Part 2612, provides that "trades or businesses which are under common control" has the same meaning as in Section 414(c) of the Internal Revenue Code ("IRC") and the regulations issued thereunder. Accordingly, if certain entities, such as X and Y, are under common control as defined in Section 414(c) of the IRC, they constitute the "employer" for purposes of Section 4203 of ERISA and no withdrawal will have occurred as a result of a transfer of assets from X to Y.

Your second question concerns the sale by X of all of the stock in its subsidiary corporation Y to your client A, an unrelated corporation which continues contributions to the plan on behalf of Y. You advise that neither X

nor A has made any other contributions to the plan; nor does either intend to make other contributions to the plan. You ask whether, as a result of the stock sale, X and Y would incur withdrawal liability under ERISA.

It is clear that Congress intended that no withdrawal occur solely because a parent employer sells the stock of a subsidiary, so long as the subsidiary continues to make its contributions to the plan. The legislative history to the Act contains the following analysis:

> A group of trades or businesses under common control is treated as a single employer. For example, if P Corporation owns 100 percent of the stock of S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change in ownership of S. 126 Cong. Rec. S10,115 (daily ed. July 29, 1980) and H.R. Rep. No. 96-869, Part II, 96th Cong., 2nd Sess. 162 (1980), reprinted in [1980] U.S. CODE CONG. & AD NEWS 3005-6.

Therefore, the sale of stock of Y to A does not effect a withdrawal, as long as Y continues to make its contributions to the plan.

Finally, with regard to the transaction you describe, we note that under Section 4212(c), if a principal purpose of any transaction is to evade or avoid liability under Part 1 of Subtitle E of Title IV of ERISA, that part shall be

applied (and liability shall be determined and collected) without regard to such transaction.

Sincerely,

/s/ Henry Rose
HENRY ROSE
General Counsel

[LOGO] 85-15

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006-1806

[May 31, 1985]

This responds to your request for the PBGC's opinion concerning Section 4204 of ERISA. Specifically you wish to know whether Section 4212(c) applies to a transaction involving a sale by an employer of an unincorporated division under Section 4204 when the sole purpose of applying Section 4204 is to avoid the seller's immediate withdrawal liability. Similarly, you wish to know whether Section 4212(c) applies if the division is first incorporated and then its stock is sold. In other words, can a plan disregard these transactions and impose liability on the seller because the sale violates the "principal purpose" rule of Section 4212(c)?

Section 4212(c) provides that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected), without regard to such transaction." Section 4204, on the other hand, provides a statutory exception to the general rule that an employer is liable if it ceases to contribute to a multiemployer pension plan. The purpose of Congress in providing Section 4204 was to allow an employer to avoid liability if a sales transaction meets the statutory conditions. Thus, the application of Section 4204 to a sales transaction does not by itself violate Section 4212(c). A plan, however, may find under all the circumstances of the transaction that Setcion 4212(c) was violated. A dispute in such a case would be subject to the dispute resolution procedures of Sections 4219 and 4221.

Likewise, as PBGC Opinion Letter 82-4 explains, the sale of the stock of a subsidiary is permitted without liability being incurred under the Act. Thus, if a division of a

corporation is first incorporated and then sold, the transaction does not automatically violate 4212(c). However, as expalined above, Section 4212(c) may be applied by a plan, if all the circumstances of the transaction so warrant, to disregard the transaction.

I hope this has been of assistance to you. If you have further questions concerning this matter, please contact of my staff at the above address or (202) 254-4873.

Very truly yours,

/s/ Edward R. Mackiewicz
EDWARD R. MACKIEWICZ
General Counsel

[LOGO] 92-1

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006-1860

[Mar. 30, 1992]

Re:

Dear

I write in response to your letter requesting the opinion of the Pension Benefit Guaranty Corporation ("PBGC") in regard to calculating liability for a complete or partial withdrawal under Section 4203 and 4205 of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended,* 29 U.S.C. §§ 1383 and 1385 (1989). Specifically, your question concerns the calculation of withdrawal liability in a situation where several members of a controlled group of corporations have an obligation to contribute to the same multiemployer pension plan and the controlled group members are sold or liquidated in a series of transactions.

As you are aware, Section 4221 of ERISA provides that disputes between a plan sponsor and an employer on issues concerning withdrawal and withdrawal liability are to be resolved first through arbitration, and, if necessary, in the courts. The PBGC does not interject itself into these statutory procedures by issuing opinions on the application of the law to particular transactions. However, the PBGC will continue its practice of answering general questions of interpretation under Title IV of ERISA.

In the hypothetical situation you present in your letter, parent company P has four wholly-owned subsidiaries, A, B, C and D. The four subsidiaries contribute to a multiemployer pension plan (the "plan") in equal periodic amounts under a single collective bargaining agreement.

In a series of transactions, P's controlled group ceases covered operations at each of the subsidiaries. First, P

closes subsidiary A and does not continue operations previously performed by A. Second, P sells the assets of subsidiary B to an unrelated purchaser. The purchaser does not assume B's contribution obligation or make contributions to the Plan. Third, P sells the stock of subsidiary C to another unrelated purchaser. C continues in business and makes required contributions to the plan. Finally, P sells the stock of subsidiary D to a third unrelated purchaser. D continues operations and contributes to the plan for several years before going out of business. You request the PBGC's opinion as to the assessment of liability for a complete or partial withdrawal stemming from this series of transactions.

For purposes of determining whether a complete or partial withdrawal has occurred, all trades or businesses under common control are to be treated as a single employer. ERISA § 4001(b)(1), 29 U.S.C. § 1301(b)(1). Under Section 4203(a) of ERISA, 29 U.S.C. § 1383(a), a complete withdrawal generally occurs when an employer permanently ceases to have an obligation to contribute under a plan, or permanently ceases all covered operations under a plan. A partial withdrawal generally occurs when an employer has a 70% contribution decline in each of three consecutive plan years; or, the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements, but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or transfers such work; or, the employer permanently ceases to have an obligation to contribute with respect to work performed at one or more but fewer than all of its facilities, while continuing to perform work at that facility of the type for which the obligation to contribute ceased. ERISA § 4205 (a) and (b), 29 U.S.C. § 1385(a) and (b). The methods for computing the amount of liability for a complete or partial withdrawal are set forth in Sections 4211 and 4206 of ERISA, 29 U.S.C. §§ 1391 and 1386. In order to determine whether a complete or partial withdrawal has

occurred and the amount of the resulting liability, contributions of the entire controlled group must be taken into account. 29 U.S.C. §§ 1301(b)(1) and 1391.

As you point out in your letter, when subsidiary A is closed in the first transaction, there is no complete or partial withdrawal by the controlled group. Three members of the controlled group continue to have an obligation to contribute to the plan and continue covered operations. There is no partial withdrawal because, on the facts assumed, there has not been a 70% decline in contributions by the controlled group over a three-year period or a partial cessation of the controlled group's contribution obligation within the meaning of Section 4205(b)(2)(A) of ERISA, 29 U.S.C. § 1385(b)(2)(A). Thus, for purposes of calculating the amount of liability for a subsequent complete or partial withdrawal under Section 4211 and 4206 of ERISA, 29 U.S.C. §§ 1391 and 1386, A's contribution history remains part of the controlled group's contribution history.

The same holds true on the sale of B's assets to an unrelated purchaser. Even though the asset sale is not structured to meet the requirements of Section 4204 of ERISA, 29 U.S.C. § 1384, there is no complete or partial withdrawal because two other members of the controlled group continue to contribute to the Plan and there has been no 70% decline in contributions over three years or any partial cessation of the controlled group's contribution obligation under 29 U.S.C. § 1385(b)(2)(A). Again, the contribution history of B remains part of the controlled group's contribution history for purposes of calculating amounts of subsequent withdrawal liability.

The sale of the stock of subsidiary C to an unrelated purchaser that continues to make contributions to the plan would ordinarily fall within the ambit of Section 4218 of ERISA, which provides in relevant part:

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—

(1) an employer ceases to exist by reason of—

(a) a change in corporation structure described in Section 4069(b) . . .

if the change causes no interruption in employer contributions or obligations to contribute under the plan . . . .

* * *

[A] successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

29 U.S.C. § 1398.

Among the changes described in Section 4069(b) of ERISA, 29 U.S.C. § 1369(b), are "a mere change in identity, form, or place of organization" and "a merger, consolidation or division." In Opinion Letters 82-4 (February 10, 1982), 83-11 (May 16, 1983), and 84-7 (December 20, 1984), the PBGC expressed its opinion that the sale of a subsidiary's stock does not bring about the withdrawal of the parent corporation, if the change causes no interruption in employer contributions or obligations to contribute under the plan.

Under the last sentence of Section 4218 of ERISA, a successor employer resulting from a restructuring described in that Section is considered the "original employer." This provision attributes the contribution history of the original employer to the successor employer resulting from the restructuring. In the typical case, the contribution history used to determine the withdrawal liability of the successor will be the contribution history that would have formed the basis for withdrawal liability if the restructuring had not occurred.

In your hypothetical, the sale of C's stock causes no interruption in contributions or obligations to the plan. C and its new controlled group, if any, and the P controlled group, continue to contribute to the Plan. Consequently, there is no complete withdrawal by the P con-

trolled group, or by C and its new controlled group, if any. Pursuant to the last sentence of Section 4218, both the P controlled group and C and its new controlled group, if any, are "successor" employers. However, in a situation such as this where multiple entities in the same controlled group contribute to the same plan, and some, but not all, of the controlled group members who contribute to the plan are the subject of a change described by Section 4218 of ERISA, neither of the successors clearly should inherit the entire contribution history of the original employer. In such a case, it is the PBGC's opinion that the contribution history of the original employer must be fully apportioned among the successor employers. The plan should make the allocation in a reasonable manner. For example, in the absence of a history of large transfers of operations or covered employees between members of the controlled group, or other unusual factors, the plan may allocate that contribution history in proportion to the contribution histories of the controlled group members that have an obligation to contribute and covered operations immediately before the Section 4218 transaction, or in your hypothetical 50% to C and 50% to the P controlled group.

Consequently, in the event of a subsequent complete withdrawal by the P controlled group, the amount of liability under Section 4211 of ERISA, 29 U.S.C. § 1391, is determined without reference to the contribution history allocable to C and its new controlled group, if any. Likewise, in the event of a subsequent complete withdrawal by C and its new controlled group, if any, the amount of liability under Section 4211 of ERISA, 29 U.S.C. § 1391, is determined without reference to the contribution history allocable to the P controlled group.

You also inquired as to the effect of the sale of C's stock on determining whether a partial withdrawal occurs under Section 4205(a)(1) of ERISA, 29 U.S.C. § 1385 (a)(1). Under your hypothetical, once C is sold, the contributions of the P controlled group decline by 75%.

Generally, a partial withdrawal occurs whenever there is a 70% contribution decline in each of three consecutive plan years measured against a base year. *See* 29 U.S.C. 1385(b)(1). Under Section 4218 of ERISA, P's controlled group would not ordinarily incur a partial withdrawal in the third plan year following the sale of C's stock. However, in order to avoid partial withdrawal liability, the decline in contributions must be "solely" because of a covered change in corporate structure. 29 U.S.C. § 1398.

In your hypothetical, it is not clear whether the decline in contributions is solely because of the sale of C's stock. The decline could be due, at least in part, to closing A and selling the assets of B to a purchaser who did not continue making contributions to the Plan. Whether a decline in contributions is solely because of a covered restructuring must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts. Relevant considerations might include the length of time between transactions, whether the transactions were related, and whether each transaction would have been subject to Section 4218 if viewed individually.

If the decline in contributions is determined to be solely because of the sale of C's stock, the contribution history transferred in the Section 4218 transaction is excluded from the base year calculations used to determine whether a 70% decline has occurred under Section 4205(b)(1)(B)(ii) of ERISA. If the decline in contributions is determined not to be solely because of the sale of C's stock, C's contribution history is included in the base year calculations.

In the final transaction, D's stock is sold to a third unrelated purchaser who continues making contributions to the Plan on behalf of D's employees. After the stock sale, the P controlled group ceased covered operations and no longer has an obligation to contribute to the Plan.

Under Section 4218 of ERISA, the P controlled group would not ordinarily be subject to withdrawal liability on the sale of D's stock. As stated above, however, in order to avoid withdrawal liability, the controlled group must cease to have such operations or such obligations "solely" because of a covered change in corporate structure. 29 U.S.C. § 1398. As discussed above, whether an employer's cessation is solely the result of a covered restructuring must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts:

Assuming that the controlled group's cessation is not solely because of a covered restructuring, it incurs a complete withdrawal. However, D and its new controlled group, if any, would be a "successor" within the meaning of the last sentence of Section 4218. Consequently, a portion of the P controlled group's remaining contribution history must be allocated to D and its new controlled group, if any, under the principles discussed above. The P controlled group's liability is then determined pursuant to Section 4211 of ERISA, 29 U.S.C. § 1391, based on the contribution history of the original employer that was not transferred to C or D. C and its new controlled group, if any, remains responsible for the contribution history previously allocated to C.

Alternatively, if the controlled group's cessation is determined to be solely because of a covered restructuring, the controlled group is not subject to withdrawal liability, even though it no longer has an obligation to contribute to the Plan or has covered operations under the Plan. In that event, D and its new controlled group, if any, inherits the contribution history of the P controlled group that was not allocated to C.

You also ask if the result would be different if the assets of D are sold in a transaction that meets the requirements of Section 4204 of ERISA, 29 U.S.C. § 1304. Under Section 4204(a)(1) of ERISA, an employer will not incur liability for a complete or partial withdrawal

"solely" because of the sale of all or a portion of its assets to an unrelated purchaser if the following conditions are met. First, the purchaser must have an obligation to contribute to the pension plan for substantially the same number of contribution base units as the seller. Second, the purchaser must provide a cash or surety bond payable to the pension plan in the five years after the sale if the purchaser withdraws or fails to make required contributions. Third, the contract for sale must provide that if the purchaser withdraws in the five years after the sale and fails to pay its withdrawal liability, the seller is secondarily liable. 29 U.S.C. § 1384(a)(1).

Under Section 4204(b)(1) of ERISA, 29 U.S.C. § 1384(b)(1), the liability of the purchaser for a subsequent complete or partial withdrawal is determined as if the purchaser was required to contribute to the plan the amount the seller was required to contribute for the operations transferred for the year of the sale and the four previous years. Thus, the purchaser assumes the contribution history of the seller for the year of the sale and the four plan years preceding the sale, but only for the contribution history relating to the assets transferred in the sale.

In your hypothetical, if the assets of D are sold in a sale that meets the requirements of Section 4204 of ERISA. the P controlled group has ceased covered operations and no longer has an obligation to contribute to the Plan. Like the sale of stock situation discussed above, the P controlled group would not ordinarily be subject to withdrawal liability on the sale of D's assets. However, under Section 4204(a)(1), as under Section 4218, in order to avoid withdrawal liability, the controlled group's cessation must occur "solely" because of a sale of assets. Again, the question of whether an employer's cessation is solely because of a particular transaction must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts.

Assuming that the controlled group's cessation is solely because of the asset sale, the controlled group does not incur withdrawal liability even though it no longer has an obligation to contribute to the Plan or has covered operations under the Plan. However, the controlled group is secondarily liable if D and its new controlled group, if any, withdraw from the Plan within 5 years of the asset sale and fail to make withdrawal liability payments. D and its new controlled group, if any, assume the contribution history relating to D's operations for the year of the sale and the previous four years.

If the controlled group's cessation is determined not to be solely because of the sale of D's assets, it incurs a complete withdrawal and its liability is determined pursuant to Section 4211 of ERISA, 29 U.S.C. § 1391, based on the contribution history of the original employer that was not transferred to C.

As a final matter, the opinions in this letter are subject to the special rule in Section 4212(c) of ERISA, which states:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability determined and collected) without regard to such transaction.

29 U.S.C. § 1392(c). Depending on the facts, some of the same considerations as are relevant in determining whether a cessation is due "solely" to a restructuring or sale of assets may be relevant under Section 4212(c).

I hope this has been of assistance to you. If you have any further questions, please ———— of my staff at

Very truly yours,

/s/ Carol Connor Flowe
CAROL CONNOR FLOWE
General Counsel

SUPREME COURT, U.S.
FILED
OCT 12 1994
OFFICE OF THE CLERK

No. 94-449

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SANTA FE PACIFIC CORPORATION,
Petitioner,
v.
CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS AND THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL R. BARNEY
LYNDA S. MOUNTS
WILLIAM H.H. HERRMANN, III
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, Virginia 22314
(703) 838-1865

ROBERT W. BLANCHETTE
KENNETH P. KOLSON
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

BETTY JO CHRISTIAN
(Counsel of Record)
EDWARD R. MACKIEWICZ
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Amici Curiae American Trucking Associations and the Association of American Railroads

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITION	3
I. THE DECISION OF THE COURT OF APPEALS PLACES A CLOUD OF UNCERTAINTY OVER INNUMERABLE SALE-OF-STOCK TRANSACTIONS	3
II. UNLESS THE UNCERTAINTY IS RESOLVED, THE ECONOMIC IMPACT OF THESE CONTINGENT WITHDRAWAL LIABILITIES COULD BE ENORMOUS	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES — Page

Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund, 827 F.2d 491 (9th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988) 4

Dorn's Transp., Inc. v. Teamsters Pension Trust Fund, 787 F.2d 897 (3d Cir. 1986) 4

Maislin Indus. v. Primary Steel, Inc., 497 U.S. 116 (1990) 7

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 4, 8

Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc., 857 F.2d 1107 (6th Cir. 1988) 4

STATUTES

29 U.S.C. § 1384 ..... 4, 5

29 U.S.C. § 1392(c) 4, 5

29 U.S.C. § 1399(c) 7

29 U.S.C. § 1399(c)(1)(C)(i)(I) 7

29 U.S.C. § 1399(c)(1)(C)(i)(II) 7

29 U.S.C. § 1405(b) 7

ACTS

Federal Aviation Administration Authorization Act of 1994, Title VI, Pub. L. No. 103-305, 108 Stat. 1569 (1994) 5

Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in scattered sections of 49 U.S.C.) 5

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1209 (1980) (codified as amended at 29 U.S.C. §§ 1381-1461 (1988)) 2

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIAL — Page

Retirement Protection Act of 1993: Hearing on H.R. 3396 Before the House Comm. on Ways and Means, 103d Cong., 2d Sess. 170 (1994) (statement of Robert M. Spira, Director of Government Relations and Senior Corporate Counsel, Leaseway Transportation Corp. on behalf of the Multiemployer Pension Plan Solvency Coalition) .. 6

MISCELLANEOUS

PBGC Op. Ltr. 85-15, 1985 PBGC LEXIS 18 (May 31, 1985) 4
PBGC *1990 Annual Report* (1991) 6
PBGC *1992 Annual Report* (1993) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-449

SANTA FE PACIFIC CORPORATION,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS AND THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interest of the trucking industry.[1] That industry consists of every type of motor carrier operation throughout the United States and includes tens of thousands of for-hire carriers, private carriers, leasing companies, and trucking suppliers. ATA

---

[1] Petitioner and Respondent have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk.

regularly advocates the trucking industry's interests before this Court and other courts.

The Association of American Railroads ("AAR") is a voluntary, not-for-profit incorporated trade association of the Nation's railroads. AAR's members operate approximately 75 percent of the line haul mileage, employ approximately 89 percent of the workers, and produce approximately 91 percent of the freight revenues of all railroads in the United States. Each of AAR's members is an interstate carrier by rail subject to the jurisdiction of the Interstate Commerce Commission. On matters of common concern, AAR represents its members before courts, agencies, and the Congress.

A number of motor carrier members of ATA contribute to multiemployer pension plans (including the Central States, Southeast and Southwest Areas Pension Fund ("Central States Fund")). Some members of the AAR have or had trucking subsidiaries that likewise contribute or contributed to multiemployer pension plans, including the Central States Fund. Such ATA and AAR members are thus subject to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Pub. L. No. 96-364, 94 Stat. 1209 (1980) (codified as amended at 29 U.S.C. §§ 1381-1461 (1988)). MPPAA imposes liability on an employer for an allocable share of the plan's unfunded vested benefit liabilities upon the employer's withdrawal from the plan, even if the employer has complied with all of its obligations under the collective bargaining agreement.

Unless reversed, the decision of the court of appeals will have a dramatic impact on a number of ATA and AAR members. To the extent such members have sold or are in the process of selling their unionized motor carrier operations in sale-of-stock transactions, the decision below will have the effect of greatly increasing their contingent liabilities to multiemployer plans. In fact, the contingent liabilities that could be triggered should the

purchaser of the covered operations subsequently withdraw from the plan could amount to tens of millions of dollars for one company alone, as described more fully herein.

REASONS FOR GRANTING THE PETITION

If allowed to stand, the decision of the court of appeals could have a dramatic impact on the Nation's trucking industry. Particularly in this era of deregulation, the marketplace must be able to allocate responsibility for withdrawal liability between buyer and seller with some assurance that their allocation will be upheld. The decision below, which conflicts with the views of three other circuits as well as the federal government agency instrumental in crafting and enforcing MPPAA, casts a cloud of uncertainty over all sales of unionized operations.

The uncertainty surrounding this area could be expected to affect adversely not only contributing employers, but also multiemployer plans themselves. Unless the parties to sales transactions can resolve their respective responsibility for withdrawal liability with some degree of certainty, sales of unionized motor carrier operations are likely to be artificially depressed. In addition, the potential for exposure to contingent liabilities running in the tens of millions of dollars could lead to employer reorganizations or liquidations. Such a trend would cause immediate harm to the industry and ultimate harm to multiemployer plans resulting from the loss of contributing employers. Therefore, the petition for certiorari should be granted, and the decision of the court of appeals should be reversed.

I. THE DECISION OF THE COURT OF APPEALS PLACES A CLOUD OF UNCERTAINTY OVER INNUMERABLE SALE-OF-STOCK TRANSACTIONS

The decision below upsets settled expectations. Until now, it was understood that the sale of covered operations that took the form of a sale of stock would not in and of

itself create a contingent liability for the seller that would be triggered if the purchasing employer later withdrew from the plan. Only "sham" transactions—where a "principal purpose" was to "evade or avoid" withdrawal liability—could lead to the imposition of withdrawal liability on the seller. ERISA § 4212(c), 29 U.S.C. § 1392(c).

The Third and Sixth Circuits have both held that a transaction does not run afoul of § 4212(c) just because it was intentionally structured as a sale of stock. *Dorn's Transp. Inc. v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986); *Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988). The Ninth Circuit has also construed § 4212 narrowly, although in a different factual context. *Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). And the Pension Benefit Guaranty Corporation ("PBGC"), which was instrumental in crafting and is responsible for enforcing MPPAA,[2] has taken the position that structuring a sale for the sole purpose of avoiding withdrawal liability does not by itself violate § 4212(c). PBGC Op. Ltr. 85-15, 1985 PBGC LEXIS 18 (May 31, 1985). In other words, a sale could be deliberately *structured* for the purpose of avoiding withdrawal liability, so long as the purpose of the *sale* was legitimate.

The Seventh Circuit in the decision below held otherwise. Its decision thus calls into question all stock sale transactions involving the sale of unionized motor carrier operations that contributed to multiemployer pension plans. Moreover, the decision also calls into question all sales transactions that were structured to take advantage of MPPAA's other "safe harbor"—§ 4204 asset sales. 29 U.S.C. § 1384. Under this provision, asset sales that are structured in accordance with the statute do not result

---

[2] *See generally Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720-22 (1984).

in the imposition of withdrawal liability on the seller unless the purchaser withdraws within five years of the sale and fails to pay the liability assessed against it. Under the Seventh Circuit's reasoning, transactions deliberately structured to comply with § 4204 so as to minimize the risk of withdrawal liability could also be deemed to violate § 4212(c).

The number of such transactions that could possibly be called into question is countless. The decade of the 1980's saw a significant "shake out" of the trucking industry as a result of the deregulation of interstate trucking in 1980. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in scattered sections of 49 U.S.C.). Since at least 1985 when PBGC issued its opinion letter, these transactions were entered into with the understanding that, as long as the transaction itself was not a sham, then choosing the *form* that the sale would take with an eye to minimizing the seller's potential withdrawal liability would not, without more, run afoul of the MPPAA's "evade or avoid" provision.

Moreover, the decision below creates uncertainty in the planning of future sales. In view of the split in the circuits and the fact that many motor carriers operate in several circuits including those with conflicting rulings on this issue, the parties to such transactions will be unable to determine with any degree of certainty the amount of liabilities that are being transferred as part of the sale. The effect of this uncertainty on the industry will be exacerbated beginning next year when a "second wave" of sales of trucking operations may well begin in response to the deregulation of *intra*state trucking that has just been enacted by Congress. *See* Federal Aviation Administration Authorization Act of 1994, Title VI, Pub. L. No. 103-305, 108 Stat. 1569 (1994).

In summary, the decision of the court of appeals creates intolerable uncertainties surrounding sales of unionized motor carrier operations.

II. UNLESS THE UNCERTAINTY IS RESOLVED, THE ECONOMIC IMPACT OF THESE CONTINGENT WITHDRAWAL LIABILITIES COULD BE ENORMOUS

The potential withdrawal liability that may be assessed against selling employers could be crushing. For example, Leaseway Transportation Corp. is a trucking company with operations throughout the United States. It currently contributes to more than 40 multiemployer pension plans. In 1993, Leaseway's aggregate contingent liabilities to these plans were estimated to *exceed* its net worth of $50 million. *See Retirement Protection Act of 1993: Hearing on H.R. 3396 Before the House Comm. on Ways and Means,* 103d Cong., 2d Sess. 170, 173 (1994) (statement of Robert M. Spira, Director of Government Relations and Senior Corporate Counsel, Leaseway Transportation Corp. on behalf of the Multiemployer Pension Plan Solvency Coalition) ("Spira Testimony").

These contingent liabilities have grown ever larger as the unfunded vested benefit liabilities of multiemployer pension plans have increased over the past few years. According to recent congressional testimony, multiemployer pension plan underfunding has increased from $5 billion in 1990 to $11 billion in 1992. Spira Testimony at 172; *see also* Pension Benefit Guaranty Corporation, *1990 Annual Report* at 22 (1991) and *1992 Annual Report* at 10 (1993). Furthermore, according to its recent annual government filings, the unfunded vested benefits for the Central States Fund has increased by approximately $459 million or 32 percent from 1991 to 1992 alone. 1992 Annual Report on Form 5500 at B-8. And, as noted in the Petition, more than 10,000 employers contribute to the Central States Fund. Pet. at 20 n.7.

The example of Leaseway demonstrates that an employer's entire net worth could be at risk with the assessment of withdrawal liability. To be sure, withdrawal liability may be paid over time, but the annual payment

amount is determined separately from the gross amount of the liability and is based on the employer's contribution history.[3] An employer in Leaseway's situation could be facing an annual liability in the millions of dollars for as long as 20 years. *See* ERISA § 4219(c), 29 U.S.C. § 1399(c).

Buyers and sellers must be able to plan for a potential liability of this magnitude. But unless the circuit conflict is resolved, that will not be possible. As things stand, unionized motor carrier operations cannot be sold in the normal course of business in such a way as to resolve contingent withdrawal liabilities with any degree of certainty. The result is likely to be that sales of such unionized operations will be artificially depressed.

Worse yet, the uncertainty could compel employers with unionized motor carrier operations to withdraw from underfunded multiemployer pension plans and "resolve" their withdrawal liabilities through Chapter 11 reorganization or liquidation. The trucking industry has already suffered numerous motor carrier bankruptcies (*see generally Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)), and the threat of massive withdrawal liability could well exacerbate the trend. This trend would endanger the financial viability of multiemployer plans. The withdrawal liability assessed against employers undergoing liquidation or dissolution is automatically reduced by as much as 50 percent. ERISA § 4225(b), 29 U.S.C. § 1405(b). Of this amount, the plan is likely to recover only cents on the dollar. In addition, large numbers of

---

[3] The annual payment amount is the product of the employer's "contribution base" multiplied by its "contribution rate." The "contribution base" is the average annual number of contribution base units for the highest three consecutive plan years during the ten plan years preceding the year in which withdrawal occurs. 29 U.S.C. § 1399(c)(1)(C)(i)(I). The applicable "contribution rate" is the highest rate at which the employer was obligated to contribute during the ten year period ending with the plan year in which the withdrawal occurs. *Id.* § 1399(c)(1)(C)(i)(II).

withdrawals result in increased financial burdens on the remaining employers, thereby encouraging further withdrawals. *See generally R.A. Gray*, 467 U.S. at 722.

Thus, in the long run, uncertainty in this area harms multiemployer pension plans and their participants as well as contributing employers.

CONCLUSION

For the reasons stated above and for the reasons set forth in the Petition, this Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

DANIEL R. BARNEY
LYNDA S. MOUNTS
WILLIAM H.H. HERRMANN, III
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, Virginia 22314
(703) 838-1865

ROBERT W. BLANCHETTE
KENNETH P. KOLSON
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

October 12, 1994

BETTY JO CHRISTIAN
(Counsel of Record)
EDWARD R. MACKIEWICZ
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Amici Curiae American Trucking Associations and the Association of American Railroads

Supreme Court, U.S.
FILED
OCT 7 1994
OFFICE OF THE CLERK

No. 94-449

In the Supreme Court of the United States

OCTOBER TERM, 1994

SANTA FE PACIFIC CORPORATION, Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMERICAN WAREHOUSE ASSOCIATION AND INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

WILLIAM H. TOWLE
Counsel of Record
Towle, Howie & Puvogel
1010 Lake Street, Suite 210
Oak Park, Illinois 60301
(708) 524-1020

In the Supreme Court of the United States

OCTOBER TERM, 1994

SANTA FE PACIFIC CORPORATION, Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, Respondents

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF AMERICAN WAREHOUSE ASSOCIATION AND INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The AMERICAN WAREHOUSE ASSOCIATION (AWA) is the trade association of the public merchandise warehouse industry. It has 382 member warehouse companies located throughout the United States.

The INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES (IARW) is the trade association for the refrigerated warehouse industry. In the United States it has 230 member warehouse companies.

Historically workers in the warehouse industry have been organized by the Teamsters Union. Such Teamsters Union contracts involve multi-employer pension plans. Consequently AWA and IARW member warehouses are subject to the withdrawal liability provisions which are the subject of this proceeding.

The warehouse industry has typically been one of small, family owned businesses. A total of 227 of the 382 member companies of AWA operate but one warehouse. For IARW the number of single plant operators is 146.

Warehouse owners have a great stake in the decision sought to be reviewed. It adversely impacts their ability to sell or transfer their business. This is especially burdensome to the small, family owned business which is usually the major asset of the owner. A lessening of that owner's ability to sell the company has a most serious, adverse consequence.

The warehouse industry has a significant interest in this proceeding.

SUMMARY OF ARGUMENT

In any sale where withdrawal liability is involved the seller always seeks to avoid post-closing withdrawal liability. Thus no sale could escape Section 1392(c) liability under the circuit court's decision. Since this decision is contrary to the view of the PBGC and other circuits, and since it unsettles past sales, it is important and necessary that it be reviewed.

ARGUMENT

THE COURT OF APPEALS DECISION ADVANCES AN INTERPRETATION THAT WILL UNSETTLE PAST SALES AND CONFOUND FUTURE TRANSACTIONS

If one of the purposes of review is to settle uncertainty and establish guides for future conduct this decision should be reviewed. Not only is it contrary to rulings of the administrative agency responsible for the statute, irreconcilable to the decisions in other circuits, but it also creates uncertainty and confusion for the parties subject to the statute.

Applying the decision to a typical sale illustrates the problems created by this decision. In such a transaction both buyer and seller must consider the application of withdrawal liability. The existence of such liability necessarily affects the purchase price, lowering it in all instances. Having reduced the purchase price to reflect this liability the seller wants to assure that it avoids any post-sale imposition of withdrawal liability.

The parties achieve this by doing an asset sale with buyer's assumption of liability pursuant to the statute. Or they can do a stock sale where the company continues to be liable.

Avoidance of post-sale withdrawal liability is always a principal purpose of any sale. When the issue is put in this manner it is clear that the court of appeal's decision would apply Section 1392(c) in every stock sale.

However, Congress did not preclude stock sales. The parties are free under the statute to use either asset sales with statutorily prescribed liability assumption or stock sales where the company continues to be liable.

Since avoiding post-sale liability is always a goal of the seller, the word "avoid" in Section 1392(c) should be read in light of its companion, "evade". There must be some kind of impropriety, or as the Third Circuit understood when it said that the facts involved did not put at issue "...the kind of bad faith that § 1392 guards against...." Dorn's Transp. v. Teamsters Pension Trust Fund, 787 F.2d 897, 902 (3d Cir. 1986).

Section 1392 requires some element of impropriety or lack of good faith. The totality of the transaction must be examined. Whether the stock sale was bona fide in its entirety should be the issue.

There are many reasons why a warehouse sold in a bona fide transaction may subsequently fail. Loss of a large customer, death or incapacity of the new owner, poor management, or even a strike by the union which ultimately causes the company to fail. All of these risks, and many more, are accentuated where small companies are involved.

When a company fails, the trustee may attack the sale under Section 1392(c). Under the Seventh Circuit's decision none of the causes for failure of the company are examined. None of the facts surrounding the sale are examined. The purchase price, terms of sale, condition of the company, experience of the buyer, trend of the business, and all other factors that prove or disprove a bona fide transaction are ignored. The only issue is whether avoidance was a

principal reason for using a stock sale. Such an approach is too narrow, as recognized by other circuits and the PBGC.

Sales which have been consummated in complete good faith are at risk. The ability of future transactions to be done by stock sale is virtually eliminated. Clearly the decision should be reviewed to determine whether that was the intent of Congress.

CONCLUSION

The petition for a writ of certiorari should be granted, and Section 1392(c) recognized to apply only when bad faith is involved.

Respectfully submitted,

William H. Towle
Counsel of Record
Towle, Howie & Puvogel
1010 Lake Street, Suite 210
Oak Park, IL 60301
708-524-1020

Counsel for Amicus Curiae
American Warehouse Association and
International Association of
Refrigerated Warehouses

(5)

FILED
OCT 18 1994
OFFICE OF THE CLERK

No. 94-449

In the Supreme Court of the United States

OCTOBER TERM, 1994

SANTA FE PACIFIC CORPORATION, PETITIONER,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

DAVID C. GUSTMAN
HARRY L. DELUNG, JR.
WESTON W. MARSH
Freeborn & Peters
311 South Wacker Drive
Chicago, Illinois 60606
(312) 360-6000

JAMES D. HOLZHAUER
Counsel of Record
STEPHEN M. SHAPIRO
KENNETH S. GELLER
ANGELA K. DORN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

13 PP

TABLE OF CONTENTS

Page

REPLY BRIEF FOR THE PETITIONER 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: Page

Cuyamaca Meats, Inc. v. *Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987), cert. denied, 485 U.S. 1008 (1988) 8

Dorn's Transp., Inc. v. *Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986) 7

Teamsters Pension Trust Fund v. *Central Mich. Trucking, Inc.*, 698 F. Supp. 698 (W.D. Mich. 1987), aff'd, 857 F.2d 1107 (6th Cir. 1988) 7

Statutes and Administrative Ruling:

29 U.S.C. § 1384 . . . . . *passim*

29 U.S.C. § 1392(c) . . . . . *passim*

29 U.S.C. § 1398 . . . . . *passim*

PBGC Opn. Ltr. 85-15 (May 31, 1985) 4

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-449

SANTA FE PACIFIC CORPORATION, PETITIONER,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR THE PETITIONER

The Seventh Circuit held that a company that decided to sell a subsidiary for reasons unrelated to withdrawal liability, but that deliberately structured the sale-of-business transaction to come within the statutory safe harbor of ERISA § 1398, ran afoul of § 1392(c) and was subject to withdrawal liability. As we demonstrate in our petition, that holding nullifies the statutory safe harbor, is contrary to formal opinions issued by the Pension Benefit Guaranty Corporation, and conflicts with decisions of three other circuits.

Central States' Brief in Opposition makes absolutely no effort to defend the Seventh Circuit's actual (and quite clear) holding. Instead, it deliberately distorts the question presented by the petition, claiming (incorrectly) that Santa Fe construes § 1398 as an "absolute" safe harbor that would

deprive § 1392(c) of any application to stock sales. Only by grossly mischaracterizing Santa Fe's argument can Central States even attempt to argue that the question presented does not warrant review.

In addition, to make the Seventh Circuit's decision appear consistent with PBGC Opinions and with the holdings of other circuits, Central States rehashes factual arguments that were *rejected* below and that played absolutely no part in the court of appeals' decision. The court of appeals deemed "irrelevant" (Pet. App. 7a) all of Central States' arguments about the prospects of SFTT under the new ownership. Central States' assertions that SFTT was a "failing" company, that assessment of withdrawal liability was "imminent" at the time of the sale, and that the purchaser was "assetless" and so weak that SFTT could not possibly survive are unsupported by the factual findings below and made no difference to the court of appeals.

This Court should pay no attention to Central States' attempt to obscure the issues, and should grant certiorari to review a decision that would seriously disrupt the settled expectations of parties to countless past and future sale-of-business transactions.

1. The central premise of Central States' Brief in Opposition—that Santa Fe proposes a rule that would make the "evade or avoid" provision of § 1392(c) inapplicable to § 1398 sale-of-stock transactions (Br. in Opp. 4-8)—is completely false. We *agree* that if a principal purpose of a sale-of-business transaction is to evade or avoid withdrawal liability, § 1392(c) applies, and the fact that the sale may have been structured in accordance with § 1398 or § 1384 does not exempt the seller from withdrawal liability. But the Seventh Circuit held something very different. It held that even though avoidance of withdrawal liability was *not* a principal purpose of the transaction (*i.e.*, the decision to sell the subsidiary), because the prospect of withdrawal liability was

a principal factor in the decision to *structure* the transaction as a sale of stock, the transaction ran afoul of § 1392(c).

It is nonsensical to hold that whenever a seller intentionally structures a legitimate sale-of-business transaction to take advantage of one of the statutory safe harbors it violates § 1392(c). Yet that is exactly what the Seventh Circuit held in this case. The court of appeals acknowledged that "[t]here is no doubt that for reasons unrelated to withdrawal liability Santa Fe wanted to get rid of the subsidiary." Pet App. 4a. But, in the court's view, that was not the issue:

> The issue is not whether Santa Fe had compelling reasons independent of withdrawal liability to divest itself of SFTT; that is a given. The issue is the *form* the divestiture took—a sale of stock rather than of assets.

Id. at 7a.

As we demonstrate in our petition, the statutory safe harbors of § 1384 and § 1398 are critical to the balance Congress sought to achieve when it enacted MPPAA. The Seventh Circuit's interpretation of § 1392(c) would effectively nullify § 1384 and § 1398 by imposing withdrawal liability whenever an employer intentionally structures a sale-of-business transaction to come within one of the safe harbors. Notwithstanding Central States' mischaracterization of the petition (Br. in Opp. 4-8), we never contended that § 1392(c) has no application to safe harbor transactions. If "a principal purpose" of a sale of business is to evade or avoid withdrawal liability, the transaction can be disregarded under § 1392(c) even if it is structured in accordance with one of the safe harbors. On the other hand, if evasion or avoidance of withdrawal liability is *not* a principal purpose of the sale of business, the fact that the transaction is deliberately structured to come within one of the safe harbors in order to prevent withdrawal liability does not run afoul of § 1392(c).

We do not claim that "§ 1398 is an absolute safe harbor" (Br. in Opp. 5) or that the "sale of a contributing subsidiary bars plans absolutely from seeking liability from the former parent if the former subsidiary withdraws." *Id.* at 6. Those are gross distortions of the petition. What we do contend is that § 1392(c) does not nullify the safe harbors, and that the deliberate structuring of a transaction to come within § 1384 or § 1398 does not by itself violate § 1392(c). Central States fails to address that critical point, which is the real point of the petition.

The legislative history and caselaw Central States relies upon (Br. in Opp. 6-7) recognize that § 1392(c) and the two safe harbors work together to ensure that legitimate corporate transactions are permitted, but "sham transactions" that are not "bona fide and arms' length" are not given effect. That is fully consistent with the previously-settled understanding of the statute that was thrown into doubt by the Seventh Circuit's decision.

2. Central States' meager attempt to reconcile the Seventh Circuit's holding with PBGC Opinion Letter 85-15 (Br. 8) also depends entirely on its mischaracterization of Santa Fe's position. Of course the PBGC Opinion did not state that § 1384 provides an "absolute exemption[ ] from withdrawal liability." *Ibid.* We never contended that it did. What the PBGC did advise is that the sale of a subsidiary would not violate § 1392(c) even though the "sole purpose" for structuring the transaction as a stock sale was to avoid withdrawal liability.

The Seventh Circuit concluded just the opposite: that the deliberate structuring of a sale-of-business transaction as a stock sale in order to avoid withdrawal liability by itself is contrary to § 1392(c). It is not possible to reconcile the PBGC Opinion Letter with the Seventh Circuit's decision. Parties to sale-of-business transactions need the Court's

guidance to resolve these contrary interpretations of important ERISA provisions.

3. Central States completely fails to come to grips with the court of appeals' broad and insupportable holding. Instead, it tries to avoid certiorari by rehashing factual arguments that were *rejected* by the arbitrator and the courts below. Central States repeatedly characterizes SFTT as a "failing" business (Br. in Opp. i, 4, 6, 12, 13); it asserts that Santa Fe sold SFTT at a point when it knew that the imposition of withdrawal liability was "imminent" and "certain" (*id.* at i, 2, 4, 13, 14); and it claims that Santa Fe, acting out of "desperation," sold the business to "an almost assetless purchaser" that was destined to fail. *Id.* at 2, 6, 13.

The simple answer to all of these factual arguments is that the Seventh Circuit did not rely on *any* of those "facts." To the contrary, it deemed them "irrelevant" to the issue of whether Santa Fe structured the transaction as a stock sale in order to preclude the imposition of withdrawal liability. Pet. App. 7a. Besides, these factual arguments were all *rejected* by the arbitrator and the district court and were not accepted by the court of appeals:

a. *SFTT was not a "failing" business.* In selling SFTT, Santa Fe did not "dump" a "failing subsidiary." The arbitrator found that "Santa Fe felt that SFTT was a viable business and could very well do better if it were not part of Santa Fe" (Pet. App. 120a) and that "SFTT was a sound company." *Id.* at 21a. That finding was bolstered by the fact that there were competing bids for the subsidiary, including a bid from senior SFTT executives in the best position to know about the company's viability. These bidders were willing to pay millions of dollars to buy the company. *Id.* at 20a-21a; 121a-122a. The court of appeals did not overturn any of those factual findings.

b. *Imposition of withdrawal liability was not "imminent."* The imposition of withdrawal liability was not "imminent" at

the time of the sale. To the contrary, "[t]he evidence in this case makes it quite clear that Santa Fe did not believe that withdrawal liability would arise after the sale." Pet. App. 21a. The district court also flatly rejected Central States' bogus argument (Br. in Opp. 13 & n.9) that withdrawal liability was imminent because of a supposed 70% decline in contribution levels. Pet. App. 47a-51a, 61a-62a. The court of appeals did not question these findings, but instead agreed that SFTT had "avoid[ed] the risk of withdrawal liability" by rehiring discharged employees. *Id.* at 4a.

c. *RSI was not a weak purchaser.* At the time of the sale, RSI, the company that purchased SFTT, was not an "assetless purchaser" destined to fail. As the arbitrator held, "the management of RSI had many years of successful experience before the purchase." Pet. App. 22a. The viability of the purchaser (and of SFTT under the purchaser) was also demonstrated by the fact that RSI was able to obtain commercial financing for the acquisition. *Id.* at 21a. Events subsequent to the sale, including a crippling strike by the Teamsters Union and the inadvisable purchase of Burlington Northern's trucking subsidiaries, caused RSI and SFTT to fail, not any inherent weakness at the outset. *Id.* at 21a-22a, 124a.

The district court held that the arbitrator's findings on *each* of these factual issues were supported by the evidence and were not clearly erroneous (Pet. App. 12a-14a), and the court of appeals did not question those findings. More importantly, Central States' implication that its assessment of withdrawal liability was warranted in light of these "facts" flies in the face of the Seventh Circuit's characterization of such factors as "irrelevant." *Id.* at 7a. The court of appeals held that Santa Fe's decision to structure the transaction as a sale of stock to avoid withdrawal liability, by itself, was sufficient to call § 1392(c) into play. It is that erroneous and detrimental holding that warrants review by this Court.

4. Central States repeats its mischaracterization of the question presented by the petition in its attempt to reconcile the conflict among the circuits. We *agree* that none of the other circuits have held that § 1392(c) has no application to § 1398 sale-of-stock transactions, but that is not our contention. As we point out in the petition (16-20), the Third, Sixth and Ninth Circuits have all construed § 1392(c) in a way that would not countenance the result reached by the Seventh Circuit in this case.

In *Dorn's Transp., Inc.* v. *Teamsters Pension Trust Fund*, 787 F.2d 897, 902 (3d Cir. 1986), the court of appeals held that a sale-of-business transaction structured as a § 1398 sale of stock and entered into by the seller to avoid withdrawal liability, did not violate § 1392(c) absent a showing of bad faith. That holding cannot be reconciled with the Seventh Circuit's conclusion that a decision to structure a transaction as a sale of stock in order to prevent withdrawal liability by itself violated § 1392(c). If the Seventh Circuit's rule had been in effect, the Third Circuit would not have needed to examine whether the transaction was entered into in bad faith. The fact that it had been entered into to avoid withdrawal liability—which the Third Circuit was willing to assume—would have been enough to violate § 1392(c).

Similarly, the ruling in *Teamsters Pension Trust Fund* v. *Central Mich. Trucking, Inc.*, 698 F. Supp. 698 (W.D. Mich. 1987), aff'd, 857 F.2d 1107 (6th Cir. 1988), made it clear that more than a decision to structure a transaction as a § 1398 sale of stock was needed to raise an issue under § 1392(c). "[I]f a transaction or change in corporate structure was not a sham * * * then withdrawal liability cannot be assessed against the predecessor corporation upon failure or withdrawal of the successor." 698 F. Supp. at 703. The Sixth Circuit's requirement of a "sham" transaction is totally inconsistent with the Seventh Circuit's holding in this case.

Cuyamaca Meats, Inc. v. *Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987), cert. denied, 485 U.S. 1008 (1988), squarely held that a "bona fide, arms-length" action, taken with the intent to reduce withdrawal liability, would not violate § 1392(c). That holding, once again, cannot be reconciled with that of the Seventh Circuit, which held that an employer violates § 1392(c) whenever it structures a legitimate transaction to prevent withdrawal liability.

5. As we demonstrate in our petition (20-24), and as the *amici* representing the trucking, railroad and warehouse industries emphasize in their briefs, the Seventh Circuit's decision threatens to disrupt the settled understanding of how MPPAA applies to countless past and future sale-of-business transactions. In light of the unambiguous statutory language, the PBGC Opinion Letter and the advice of numerous secondary sources relying on those authorities, parties selling or buying businesses have deliberately structured their transactions as § 1398 stock sales in order to prevent withdrawal liability. The Seventh Circuit's decision calls this widespread practice into question, and parties to these transactions need to have the uncertainty put to rest.

Central States' assertion (Br. in Opp. 12-15) that the issue presented by this case has not come up frequently in the past ignores the fact that prior to the Seventh Circuit's decision, businesses and their counsel believed that the law was settled and that the deliberate structuring of a transaction to fit within one of the statutory safe harbors would not, by itself, violate § 1392(c). Now that the law in this area has been confused by the Seventh Circuit's decision, the issue will be aggressively pursued by pension fund trustees seeking multi-million dollar recoveries, and will needlessly disrupt past and future transactions.

Central States' emphasis, once again, on the "unique set of facts" of the Santa Fe transaction—"facts" that were *rejected* by the arbitrator and the courts below—does not alter

the court of appeals' broad legal holding or diminish its importance.* The Seventh Circuit's legal holding was not that withdrawal liability was warranted by the particular facts of the SFTT transaction. Rather, the court of appeals held that § 1392(c) comes into play whenever a company deliberately structures a legitimate sale-of-business transaction to fall within the protection of § 1398.

This Court should review the Seventh Circuit's expansive legal ruling, a ruling that directly contradicts the formal opinion issued by the PBGC shortly after the enactment of MPPAA, and that cannot be reconciled with decisions of three other circuits. The court of appeals' decision casts serious doubt on the legal rules applicable to past and future sale-of-business transactions. That doubt should not be permitted to linger.

---

* For example, Central States asserts that "[i]t is the imminence of the withdrawal, coupled with the decision to divest, that makes 'a' principal purpose of the sale to evade or avoid withdrawal liability." Br. in Opp. 14. But the Seventh Circuit did not rely on "the imminence of withdrawal" in reaching its decision, and did not overturn the arbitrator's finding that withdrawal was not imminent. Pet. App. 21a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID C. GUSTMAN
HARRY L. DELUNG, JR.
WESTON W. MARSH
Freeborn & Peters
311 South Wacker Drive
Chicago, Illinois 60606
(312) 360-6000

JAMES D. HOLZHAUER
Counsel of Record
STEPHEN M. SHAPIRO
KENNETH S. GELLER
ANGELA K. DORN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

October 1994